Supreme Court, U.S.
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90-1622
No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

Alfred E. Fant, Petitioner

v.

Johnnie B. Stephens, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action to set aside a conveyance in fraud of creditors, whether a state appeals court deprives a person of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States whenever that court sua sponte makes a ruling that real property is exempt from executions or liens as a matter of law because of the defense of homestead exemption, yet such court never gave the party adversely affected by such ruling notice or opportunity to show that the homestead exemption defense was not available under the facts of the case.

LIST OF NAMES OF THE PARTIES

The following is a complete list of all parties to this action:

PETITIONER: **ALFRED E. FANT**

Plaintiff at the Trial Court

RESPONDENT: **JOHNNIE B. STEPHENS**

Defendant at the Trial Court

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ON WRIT OF CERTIORARI TO THE

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Alfred E. Fant, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above entitled case on January 23, 1991.

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Annot., 172 A.L.R. 18 (1948).

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LEGAL ENCYCLOPEDIAS:

16D C.J.S. Constitutional Law Section 1173b, p. 131 (1985)

37 C.J.S. Fraudulent Transfers Sections 399, 233 (1943)

17 TEX.JUR.3rd Creditor's Rights Section 615, p.621 (1982)

REFERENCE TO REPORTS

It being unpublished, there is no official or unofficial report of the only opinion delivered in the case.

GROUNDS OF JURISDICTION

(i) Date of entry of order denying Petitioner's Motion for Rehearing in the Texas Supreme Court:

On the twenty-third day of January, 1991, the Texas Supreme Court denied Petitioner's Motion for Rehearing of his Application for Writ of Error.

(ii) Date of entry of order denying Petitioner's Application for Writ of Error:

On the fourteenth day of November, 1990, the Supreme Court of Texas denied Petitioner's Application for Writ of

Error.

(iii) Date of entry of order denying Petitioner's Motion for Rehearing in the appellate court:

On the twentieth day of July, 1990, the Court of Appeals for the Twelfth Court of Appeals District of Texas overruled Petitioner's Motion for Rehearing:

(iv) Date of entry of order of the appellate court which affirmed the judgment of the trial court:

On the thirty-first day of May, 1990, the Court of Appeals for the Twelfth Court of Appeals District of Texas entered the judgment of which review ultimately is sought.

STATUTORY GROUNDS FOR JURISDICTION

Federal statutory provisions in the case:

Jurisdiction for review by writ of certiorari by the Supreme Court of the United States: Title 28, Section 1257, U.S.C.A.:

(a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any state is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, or privilege of immunity is specially set up or claimed

under the Constitution or the treaties of, or any commission held or authority exercised under the United States.

As the law is applied to the facts in this respect, introduction by the appellate court of an alleged defense of homestead exemption in an action to set aside a conveyance in fraud of creditors, where no notice was provided to the party adversely affected thereby that the court was considering the issue of homestead exemption, and where no opportunity was provided to the party adversely affected thereby to submit argument on such issue, is a denial of constitutional due process prohibited by Amendment XIV of the United States Constitution. Petitioner has specially set up this alleged denial of constitutional due process as assigned error in all subsequent appellate proceedings, thereby preserving his right to have this grievance redressed.

CONSTITUTIONAL PROVISIONS

Constitutional provisions in the case:

THE CONSTITUTION OF THE UNITED STATES—AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, Sec. 1.

STATEMENT OF THE CASE

The original suit brought by Petitioner in a state court of first instance, ("the trial court"), was an action to set aside a conveyance of real property in fraud of creditors. The trial court rendered a judgment against Petitioner based, at least in part, upon a jury verdict against Petitioner, and Petitioner perfected an appeal to a state court of appeals of intermediate jurisdiction, ("the appellate court"). In his brief to the appellate court, Petitioner averred seven errors committed by the trial court, and listed these seven errors in seven separate points in his brief. In answer to Petitioner's seven points of error, Respondent filed a brief with the appellate court, and made therein a reply to each of Petitioner's points, specifically denying each one by negation and asserting that the errors alleged by Petitioner were not errors. These points and replies to points, which serve the office of pleadings in appellate practice, joined and well-defined the issues for the appellate court and the parties.

The appellate court rendered a decision which sustained one of Petitioner's points of error, and overruled Petitioner's other six points of error. The appellate court then proceeded to rule that the one point of error which was sustained was harmless error, and based such determination upon the principle that in an action to set aside a conveyance in fraud of creditors, a defense of homestead exemption will always prevail. The appellate court, however, failed to take into account Petitioner's contention that, although a valid homestead exemption would certainly prevail, Respondent did not have a valid homestead exemption as she failed to established the prima facie requisites of a homestead exemption. The appellate court appears to have presumed that a valid homestead exemption existed as a matter of law, when in fact, Petitioner could have shown that the homestead claim was invalid, indeed was even fraudulent. Petitioner was given no opportunity to provide input to the appellate court on this issue. Yet, the appellate court, without communicating any notice to Petitioner that it was considering the subject of homestead exemption, and notwithstanding that Respondent had not communicated notice to Petitioner that she was contending for or seeking an adjudication that her homestead claim was valid, proceeded to sua sponte adjudicate the issue of homestead exemption. According to the appellate court, this finding as to the existence of a valid homestead exemption as a matter of law

rendered harmless the error of the point sustained, and also rendered harmless other alleged errors in points overruled. Opinion Of The Appellate Court: Appendix Section 2—Document A, page A-3 Appellate's Brief: Appendix Section 4—Document A, Page A-12 Points Of Appellant's Brief: Appendix Section 4—Document B, Page A-25

Departure by the appellate court from the issues duly developed by the opposing parties, ("the presented issues"), without providing notice to Petitioner, who was adversely affected thereby, was a denial by state officers of procedural due process—a denial prohibited by the Fourteenth Amendment to the Constitution of the United States.

The first major point of error assigned by Petitioner as error in the trial court was overruled by the appellate court. The trial court excluded from evidence a judgment in favor of Petitioner which established the indebtedness (unliquidated liability) of certain individuals, Fred Howell and Bessie Howell ("the grantors"), who subsequent to this judgment, conveyed the real property at issue in this case to Respondent in an attempt to avoid execution of this judgment against them. These same grantors had earlier conveyed to this same Respondent, in a similar attempt to avoid execution of the judgment against them, another parcel of land, actually lying between the two lots of land which are at issue in the present case,

near in time to the fraudulent conveyance at issue here, similar in nature to the fraudulent conveyance at issue here, and involving the same parties as the fraudulent conveyance at issue here. This earlier conveyance is presently in issue at the trial court level in an action to set aside a conveyance in fraud of creditors similar to the action on appeal here. Indeed, the outcome of the action still pending before the trial court depends heavily upon the outcome of the case on appeal here, ("the case at bar being reviewed"). Judgment Of The Texas Supreme Court Dated February 9, 1977: Appendix Section 4—Document C, Page A-28; Statement Of The Facts (Page 14-17) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document D, page A-36; Warranty Deed Dated September 2, 1977: Appendix Section 4—Document E, page A-39; Statement Of Facts (Page 39-40) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document F, Page A-42.

The second major point of error assigned by Petitioner as error in the trial court was sustained by the appellate court. The trial court excluded from evidence a duly authenticated, written appraisal by a public officer which evidenced the value of the real property which is alleged to have been conveyed in fraud of creditors, and which is the subject of the case at bar being reviewed. This error was held harmless by the appellate court, without notice to Petitioner that such determination of harmlessness was being based on the presumption

that homestead exemption was a valid defense in this case, and without opportunity for Petitioner to contest such presumption. The Written Appraisal: Appendix Section 4—Document G, page A-43; Statement Of Facts (Page 82) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document H, page A-45.

The remaining five points of error assigned by Petitioner as error in the trial court were overruled by the appellate court. These five points alleged error in the pre-trial procedure of the trial court. The trial court overruled special exceptions made by Petitioner to the legal sufficiency of Respondent's defense as submitted in her original answer. The final judgment in the trial court was almost certainly based exclusively upon the verdict of the jury, and not on the matter involved in such special exceptions. The errors alleged by these special exceptions have been carried up on the appeal through all stages because any one of them remaining unreversed might possibly justify affirmance of the trial court's judgment and denial of reversal by the appellate court on remand, and such condition might render harmless the two major errors asserted herein, as well as the constitutional error of denial of due process. These five points of error are briefly summarized as follows:

1) A point overruled by the appellate court assigned error to the trial court because the trial court overruled Petitioner's special exception to the effect that Respondent had incorrectly alleged that

either the two or the three-year statute of limitations were applicable to an action for setting aside a conveyance in fraud of creditors, when in fact neither the two nor the three-year statute of limitations are defenses in Texas to an action for setting aside a conveyance in fraud of creditors.

2) A point overruled by the appellate court assigned error to the trial court because the trial court overruled Petitioner's special exception to the effect that Respondent had correctly alleged that the four-year statute of limitations applied to actions to set aside conveyances in fraud of creditors, yet Respondent had omitted a material allegation that the four-year statute of limitations is tolled until Petitioner learns or should have learned of the fraudulent conveyance, and Respondent omitted a material allegation that Petitioner had learned or should have learned of such conveyance within the four years since the conveyance had been made.

3) A point overruled by the appellate court assigned error to the trial court because the trial court overruled Petitioner's special exception to the effect that Respondent's plea of homestead exemption was unavailing as a defense for Respondent in her own right because whatever title she had acquired was acquired on land that had already been conveyed in fraud of creditors, and thus her title was subject to any infirmities or defects that had attached to the land.

4) A point overruled by the appellate court assigned error to the trial court because the trial court overruled Petitioner's special exception to the effect that Respondent's plea of homestead exemption was unavailing as a defense for Respondent in her capacity as member of a family protected by the homestead exemption because Respondent had omitted a material allegation that she was an unmarried adult child of parties who were protected under the homestead exemption, and Respondent failed to show any other basis which would allow her a homestead exemption.

5) A point overruled by the appellate court assigned error to the trial court because the trial court overruled Petitioner's special exception to the effect that Respondent's plea that she was a bona fide purchaser failed to include the material allegation that her purchase was for a fair consideration.

PROCEDURE: RAISING THE FEDERAL QUESTION

(1) The decision of the appellate court in which the alleged constitutional error occurred was rendered on the thirty-first day of May, 1990. Opinion Of The Appellate Court: Appendix Section 2—Document A, page A-3.

(2) A motion for rehearing of the case decided by the appellate court above was made to give the appellate court the opportunity to address the alleged constitutional error committed by that court, and

such motion was filed with the clerk of that court on the fourteenth day of June, 1990. Petitioner's Motion For Rehearing To The Appellate Court: Appendix Section 4—Document I, page A-46. This motion for rehearing raised, inter alia, the following point:...

"X X X"

Two:

The court erred in overruling the Appellant's Point Of Error Two which declared 'The trial court erred in excluding from evidence an appraisal of value in a report of a public officer, and notwithstanding the error, and despite its adjudication as an error, the court erred in holding the trial court error harmless for each and all of the following particulars:

"X X X"

(f) the omission of fair notice and opportunity to be heard by Appellant on the subject of a departure proposed by the court from adjudication on the issues of the points and replies to points was a procedural denial of property without due process of law forbidden with respect to a person by the Fourteenth Amendment to the Constitution of the United States of America; the state having made appeal available in adjudications affecting property, its courts are subject to such constitutional laws regulating procedure...

"X X X"

This motion for rehearing was received by the Clerk of the Appellate Court on the fourteenth day of June, 1990. Report From Appellate Court Of Filing Of Motion For Rehearing To Appellate Court: Appendix Section 4—Document J, page A-53. This motion for rehearing was timely filed as per the requirements of Rule 100(a), Texas Rules of Appellate Procedure. Appellate Procedural Rule: Appendix Section 4—Document K, page A-55.

(3) This motion for rehearing in the appellate court was overruled by the appellate court on the twentieth day of July, 1990. Order On Motion For Rehearing To The Appellate Court: Appendix Section 3—Document A, page A-8.

(4) An application for a writ of error was made to the Texas Supreme Court, the court of last resort in Texas, requesting a review of the decision and judgment of the appellate court. This application for writ of error was duly and timely filed with the Clerk of the Appellate Court on the twentieth day of August, 1990. Petitioner's Application For Writ Of Error Filed With The Appellate Court: Appendix Section 4—Document L, page A-56. In this application, the following point of error was presented:...

"X X X"

Third Point of Error:

The Court of Appeals erred in that the procedure made

the basis of the Second Point of Error was a denial of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States of America.

X X X

Second Point of Error:

The Court of Appeals erred in making an adjudication of harmless error not requested by Respondent in her brief or presented by the points and replies to points without furnishing fair notice beforehand to Petitioner enabling him to be heard on the subject.

X X X"

This application for writ of error was received by the Clerk of the Court of Appeals on the twentieth of August, 1990. Report From Appellate Court Of Filing Of Application For Writ of Error: Appendix Section 4—Document M, page A-60. This application for writ of error was timely filed as per Rule 130, Texas Rules of Appellate Procedure. Appellate Procedural Rule: Appendix Section 4—Document N, page A-62.

(5) The Supreme Court of Texas denied Petitioner's application for writ of error on the fourteenth day of November, 1990. Order Denying Application For Writ Of Error To The Texas Supreme Court: Appendix Section 1—Document A, page A-1.

(6) A motion for rehearing was duly and timely filed with the Clerk of the Supreme Court of Texas on the twenty-ninth day of November, 1990. Petitioner's Motion For Rehearing To The Texas Supreme Court: Appendix Section 4—Document O, page A-63. This motion requested the Supreme Court of Texas to set aside its decision denying discretionary review (the application for writ of error). This motion requested the Supreme Court to grant discretionary review and the following point was presented in support of such motion:

"X X X

Third Point:

The Supreme Court erred in denying application for writ of error, in effect not reversing the adjudication made by the procedure which is made the basis of the Second Point, which was a denial of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States of America.

X X X

Second Point:

The Supreme Court erred in denying application for writ of error, in effect not reversing an adjudication of harmless error not requested by Respondent in her brief or presented by the points and replies to points in her brief

without furnishing fair notice beforehand to Petitioner enabling him to be heard on the subject.

X X X"

This motion for rehearing to the Supreme Court of Texas was received by the clerk of that court on the twenty-ninth day of November, 1990. Petitioner's Motion For Rehearing To The Texas Supreme Court: Appendix Section 4—Document O, page A-63. This motion for rehearing to the Supreme Court of Texas was timely filed as per Rule 190(a), Texas Rules of Appellate Procedure. Appellate Procedural Rule: Appendix Section 4—Document P, page A-74.

(7) The Supreme Court of Texas overruled Petitioner's motion for rehearing of the denial of discretionary review (the application for writ of error) on the twenty-third day of January, 1991. Order Overruling Motion For Rehearing To The Texas Supreme Court: Appendix Section 3—Document B, page A-10.

ARGUMENT

Mr. Justice Shinn, of the Second District Court of Appeals for California, said it all when he said:

> In our research we have not discovered another case in which judgment was rendered upon a point of law raised by the court with no warning of counsel and no opportunity given to ward off the blow.
>
> Elementary principles of due process support our conclusion that if, during a trial, the court sua sponte unearths a point of law which it deems to be decisive of the cause, the party against whom the decision impends has the same right to be heard before the decision is announced that he has to produce evidence upon the issues of fact. Denial of that opportunity deprived Defendant of a substantial right to which he was entitled by virtue of the guarantee of due process.
>
> ...
>
> ...It is true that he could have asked the court to recall its decision and listen to argument, but the opportunity, as every lawyer knows, is a poor substitute for the right to be heard before the decision is announced.

Moore v. California Mineral Products Corp., 252 P.2d 1005, 115

Cal. 2d 834 (Ct. App. 19xx). Accord WJR, The Goodwill Station v. Federal Comm. Comm'n, 174 F.2d 226, rev'd on other grounds, 337 U.S. 265, 66 S. Ct. 1097, 93 L.Ed. 1353 (1946).

These cases penetrate to the core of the problem in the case at hand, and warns of the hazards inherent whenever a court rules on a question of law without giving the parties notice and an opportunity to be heard. Notwithstanding their authority to construe and interpret the law in the case, a court must ever be watchful and wary of its own fallibility, and the higher the court is in the hierarchy of the review process, the more watchful and wary it should be, and the more reason why it should allow input from the parties before it rules on a question of law. See also Annot., 23 A.L.R.2d 852 (1952), which argues that a trial court must give parties notice and opportunity to be heard before ordering a new trial on its own motion. This annotation makes the point that the absence of a formal written rule requiring notice or the lack of a procedure that would facilitate the giving of notice does not license a court to proceed on its own and to ignore the fundamental principles of due process, which require that fair notice be given to all parties of issues that could be decisive in the case.

The need for a hearing and notice on issues of law exists in the reviewing court for the very same reason it exists in the trial court.

While it is true that two or more heads (which is usually the case in a court of review) are better than one, multiplying the number of judges reviewing a case, while reducing the risk of error, does not eliminate the need for, or the benefit derived from, allowing the participants to contribute their thoughts in an effort to reduce the chances of justice going awry. The fact that an extra judge may be on the case does not always mean that the parties have extra protection from error. Extra judges sometimes work out as 'an extra man on a sinking log'.

When the parties most interested in the case are not given notice and an opportunity to be heard on issues that depart from the issues formally presented to the court, the court presumptuously touts its infallibility. If the court should err, the party adversely affected by the error often doesn't learn of the error until he gets a letter in the mail notifying him after the fact, when the coup is complete and total with the finality of a fait accompli.

The fact that the attorneys in an adversary proceeding have labored long and hard to develop a set of well-defined issues on appeal, and the fact that the interest of the parties gives them a right to have some control over their case, should persuade the reviewing court to adjudicate the case solely on those issues developed by the parties. When the court chooses to leave the track of the issues laid

down by the parties, it should at the very least give notice to those expected to be adversely affected thereby. Otherwise, the injustice looms very large in comparison to the minor inconvenience incurred by the court in notifying the parties in limine. If the court cannot, or will not, furnish this notice, then it should accede to the universal maxim of leaving well enough alone, and adjudicate only those issues presented by the parties pursuant to the appellate rules of practice. Appellate Procedural Rule: Appendix Section 4—Document Q, page A-75.

Finally, for the case at bar being reviewed, Petitioner's challenge to the ex parte introduction by the appellate court of the unpresented issue of homestead is not an attempt by Petitioner to avoid or suppress that issue. Petitioner acknowledged the presence of this issue and he met it squarely in the trial court through his pleadings. Petitioner's First Amended Original Petition and his Third Supplemental Petition pleaded matter in avoidance of this defense. Plaintiff's First Amended Original Petition: Appendix Section 4—Document R, page A-76. Replication Of Plaintiff's Third Supplemental Petition: Appendix Section 4—Document S, page A-78. The gist of Petitioner's argument was that the defense of homestead exemption was not available to Respondent either in her unstated capacity as a member of a family unit protected by such

exemption, nor was it available to Respondent in her own right as grantee of the title conveyed by the grantors.

The evidence at trial showed that Respondent was the daughter of one of the grantors and the step-daughter of the other grantor. Respondent might have shared in the homestead exemption of her parents as part of the family unit protected by such exemption, but she failed at trial to show that she was a member of the family unit when she omitted a material allegation from her pleadings a claim that she was the unmarried adult child of those grantors, and thus she omitted a claim that she was entitled to share in the homestead exemption in her capacity as a member of that family unit. The grantors, Respondent's parents, continued to live upon the land jointly with Respondent until their respective deaths on December 27, 1983 and February 9, 1984, after the filing of this action at bar. Whatever homestead exemption these grantors may have had ceased upon their deaths, and Respondent's failure to allege that she was a member of that family unit meant that any exemption based upon such family unit died with the grantors.

The defense of homestead exemption was also unavailable to Respondent in her own right in her capacity as grantee of the title conveyed by the grantors. The grantors conveyed title of the property at issue in this case to Respondent on June 14, 1978,

subsequent to the rendition of judgment against them and in favor of Petitioner. The grantors continued to possess, use, and enjoy the land as their home jointly with Respondent until their deaths. After the deaths of the grantors, Petitioner amended his pleading to exclude the grantors from the case as parties. The continued possession of the land by the grantors after they had conveyed it to the Respondent was a badge of fraud and made any claim by Respondent that she had received the conveyance in good faith a fraudulent claim, and rendered the land purportedly conveyed to her subject to the payment of the grantors' legal debts.

It is supported by well-established law that had the grantors at the time of their deaths owned the land purportedly conveyed to Respondent, such land would have been subject to the payment of the descendents' debts. Givens v. Hudson, 64 Tex. 471 (1885). See also Tex. Prob. Code Ann. Sec. 37 (Vernon 1980). Respondent alleges that the grantors did not own the land at the time of their deaths, but yet they possessed, used, and enjoyed the land just as they had before the conveyance to Respondent. From the time of the alleged conveyance in fraud of creditors until their deaths, the grantors' lives did not change one iota with respect to the land purportedly conveyed to Respondent in the deed of June 14, 1978. The circumstances of the situation lights up the deed for what it

really was—a sham to prevent just application of the descendents' property to the payment of their debts. See 37 C.J.S. Fraudulent Conveyances, Section 399 (1943): Retention of possession of personal property by the seller after an absolute sale is inconsistent with a bona fide sale and is evidence of fraud.

...

...Although in some jurisdictions the rules with respect to the retention of possession or apparent title apply with equal force to both real and person property, in most jurisdictions the rule governing personal property, to the effect that retention of possession by the seller is fraudulent, either prima facie or as a matter of law, does not apply to conveyances of real estate. In connection with other circumstances however, retention of possession by the vendor of realty may constitute fraud.

In the trial court of the case at bar, Respondent requested the court to render an instructed verdict in her favor basing her request on the grounds that the defense of homestead exemption was available to her as a matter of law. The trial court denied Respondent's request, thereby implying that such defense was not available as a matter of law. That ruling by the trial court should have taken the issue out of the appeal unless Respondent assigned

the ruling as error in a point, which Respondent did not do.

When Respondent failed to allege error by the trial court in holding that the homestead exemption was not available to her automatically as a matter of law, Petitioner justifiably believed that this issue was being left in repose. Thus when the appellate court ruled that the homestead exemption was available as a matter of law in this case, Petitioner was understandably surprised and blind-sided, especially since the appellate court provided no notice that it was considering this issue and provided no opportunity for Petitioner to be heard on this issue. For all the Petitioner knows, the appellate court missed or overlooked all the questions of fact present in this issue when it chose to interject the homestead issue and declare it decided as a matter of law. Replication Of Plaintiff's First Amended Original Petition: Appendix Section 4—Document R, page A-76. Plaintiff's Third Supplemental Petition: Appendix Section 4—Document S, page A-78. Statement Of Facts (Page 83-85, 99) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document T, page A-82. Appellate Procedural Rule: Appendix Section 4—Document Q, page A-75.

Petitioner does not argue that the appellate court committed error when it decided that the homestead issue was relevant to its decision. Instead, Petitioner argues that, judging from the way the

appellate court was silent on the precise facts of the issue, the appellate court was not even aware that there were facts that might have controverted Respondent's claim to a homestead exemption as a matter of law. This is the pitfall that a court falls into when it proceeds to depart from the presented issues without giving notice to those most familiar with the issues.

While it seems to be well-established that neither the due process clause nor any other provision of the Constitution requires that a state provide an appeal procedure from a trial court which observes due process of law in its initial trials, it is equally well-established that, having provided an appeal from its court of first instance, the procedures of that appeal must meet the constitutional requisites of the due process clause of the Fourteenth Amendment to the Constitution. See National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92, 99 L. Ed. 48 (1954) (Black, J., dissenting):

> True, this court has said that a state is not constitutionally required to provide a system of appellate court review. But since Washington has done so, proceedings in its supreme court are merely the final stage in the judicial process in trying cases, and therefore cannot be conducted so as to deny that "due process" which the Fourteenth Amendment requires.

See also Compton v. Naylor, 392 F.Supp. 575 (N.D. Tex. 1975). See also 16D C.J.S. Constitutional Law, Section 1173(b), page 131 (1985).

Respondent makes no claim of error in the trial court, nor does she even hint at a claim of harmless error by that court in her brief to the appellate court. On the contrary, Respondent chose to stone-wall it and deny any error on the part of the trial court with respect to the homestead issue or any other issue. Appellee's Brief: Appendix Section 4—Document A, page A-12. If the appellate court could not leave well enough alone, then by some simple device it should have furnished notice to the Petitioner that it was going to take up something new that was not presented in the briefs of the parties. Anything short of notice to the parties that the court was planning to depart from the presented issue is unfair and a lack of procedural due process.

COMMON LAW QUESTIONS

1. First Common Law Error:

On February 9, 1977, the Supreme Court of Texas rendered a decision and opinion which established that Fred and Bessie Howell, the grantors in the present case at bar being reviewed, were liable to Petitioner for an undetermined amount of compensatory

damages. Fant v. Howell, 547 S.W.2d 261 (Tex. 1977). Judgment Of The Texas Supreme Court Dated February 9, 1977: Appendix Section 4—Document C, page A-28. At that time, Fred Howell, age 84 years, and Bessie Howell, age 79 years, were the sole owners of land which they claimed as homestead. While this homestead would be exempt from attachment by creditors of the Howells for as long as they lived on it, upon their deaths the land would be considered an asset of the estate subject to the debts of the descendants:

> The homestead may descend to and vest, as other real property of a deceased person, in his heirs, and it may be governed by the same laws of descent and distribution as other real property and yet be liable to sale for the debts of the deceased person as other real property is liable, unless it has descended to or vested, wholly or in part in fee or lesser estate, in some person or association of persons, as in law constitute a family, for it is only to the family that the exemption given by constitution or statues... (applies).

Givens v. Hudson, 64 Tex. 471 (1985).

On September 2, 1977, almost seven months after their liability to Petitioner was established in the Texas Supreme Court, the Howells conveyed a parcel of land from their homestead to Respondent in the case at bar, Johnnie B. Stephens, such

conveyance henceforth to be known as the First Conveyance. The judgment of the Texas Supreme Court which established the liability of the Howells is certainly relevant towards showing the possible motivation behind the First Conveyance. Warranty Deed Dated September 2, 1977: Appendix Section 4—Document E, page A-39.

On May 22, 1978, Petitioner finally obtained from the trial court the judgment promised him by the Texas Supreme Court fifteen months before. Statement Of Facts (Pages 14-17) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document D, page A-36. On June 14, 1978, three weeks after such judgment was obtained, the Howells conveyed the remainder of their homestead to Respondent, such conveyance henceforth to be known as the Second Conveyance. Statement Of Facts (Page 39-40) Of Trail of Case At Bar Being Reviewed: Appendix Section 4—Document F, page A-42. The judgment of May 22, 1978 as well as the Texas Supreme Court judgment of February 9, 1977 both show possible motivation behind the Second Conveyance.

Petitioner did not know of either of these conveyances at the time that they occurred, but when he discovered them, he instituted suits to set aside these conveyances as fraudulent attempts to avoid execution of his judgments against the Howells. The suit contesting the First Conveyance is still pending before the trial court, and the

suit contesting the Second Conveyance has become the case at bar being reviewed. In the trial court of the suit to set aside the Second Conveyance, the case at bar being reviewed, Petitioner offered into evidence the judgment of the Texas Supreme Court rendered February 9, 1977. The trial court excluded this evidence as irrelevant. However Petitioner contends that such evidence was relevant to showing a fraudulent motivation in both the First Conveyance and in the Second Conveyance: "It seems to be the settled doctrine sustained by numerous adjudicated cases that where the issues involves the fraudulent sale or conveyance of property, that evidence of other like conveyances by the same parties, at, or about the same time, are admissible." Day v. Stone, 59 Tex. 612 (1883). See also 17 Tex. Jur. 3d Creditor's Rights, Section 615, page 621 (1982):

> In a suit involving an alleged fraudulent conveyance, evidence may be shown of other transfers at or about the same time. Such evidence is admissible on the theory that where transactions of a similar character between the same parties are closely related in time, the reasonable inference is that they are actuated by the same motive.

Exclusion of this offer of the judgment of the Supreme Court of Texas left the record at trial silent as to the liability or indebtedness

of the Howells at the time of the execution of the deed in the First Conveyance. Had such evidence been admitted in the trial of the Second Conveyance, the motivation behind the First Conveyance would have been established, and once established, it would have shown that Respondent and the Howells were engaged in a systematic pattern of fraudulent conveyances in an effort to avoid the judgments against the Howells. Admission into evidence of the deed dated September 2, 1977 executing the First Conveyance standing by itself as not enough to show fraudulent behavior in either the First Conveyance or the Second Conveyance. The deed executing the First Conveyance had to be accompanied by the Texas Supreme Court judgment of February 9, 1977, or else Petitioner would be unable to show fraudulent motivation in the First Conveyance, and Petitioner's inability to show a pattern of fraudulent conveyances certainly hurt his chances of showing the fraudulent motive behind the Second Conveyance, which is the case at bar being reviewed. See 37 C.J.S. Fraudulent Transfers, Section 399 at page 233 (1943): "It may be shown that actions are pending or threatened against the debtor at the time of the transfer ... (on the issue of intent)." See also Wooten v. Weston, 151 Ga. 421, 121 S.E. 806 (1924):

The defendants in the suit were charged with a fraudulent

conveyance of their property to their sister, as a part of a scheme to divest themselves of their property so as to hinder, delay, and defraud creditors; and this suit was brought to set aside and cancel the deed. Evidence that the defendants suffered another judgment to be rendered against them at the same term of court at which the Plaintiff in this suit secured his judgment was admissible to show that the deed referred to was a part of the scheme...

When Petitioner offered the judgment of the Texas Supreme Court decision of February 9, 1977 into evidence, Petitioner contemporaneously asked the court to take judicial notice of the judgment. Although the court sustained Respondent's objection to the relevancy of the Supreme Court judgment, the court did agree to take judicial notice of it in respect to its authentication, but the court excluded the judgment from the evidence presented to the jury, and such exclusion most certainly led the jury to the wrong conclusion as regards the continuing fraudulent scheme of the Respondent and the Howells. Statement Of Facts (Page 14-17) Of Trial Of Case At Bar Being Reviewed: Appendix Section 4—Document D, page A-36. The appellate court overruled the assignment of error alleged by Petitioner as to the exclusion of this judgment of the Texas Supreme Court.

2. Second Major Common Law Error

Petitioner's assignment of error to the trial court's exclusion of evidence of an appraisal of a public official showing the value of the land conveyed by the Howells to the Respondent was sustained by the appellate court, but was held to be harmless error, and is now the law of the case. The Written Appraisal: Appendix Section 4—Document G, page A-43.

3. Common Law Errors Regarding Special Exceptions Pled By Petitioner

a. Statutes of Limitations Pled by Respondent

In her pleading in the trial court, Respondent declared that the action for setting aside the conveyance in fraud of creditors was barred by the two, three and four-year statutes of limitations of action, in just about those same words. Petitioner specially excepted to the purported application of the two and three-year statutes of limitations of actions as being inapplicable, and to the four-year statute of limitations as being insufficiently pled because of the omission of a material allegation that the four-year period of limitations had elapsed since Petitioner had either first learned of the existence of the cause of action, or should have learned of it in the exercise of reasonable care. The trial court overruled the special exceptions and the appellate court overruled Petitioner's assignment

of error for the action of the trial court in this respect.

In the case of Hoerster v. Wilke, 138 Tex. 263, 158 S.W. 288 (1942), the Supreme Court of Texas addressed the issue of the statutes of limitations as they are found in Articles 5507, 5526, and 5529 of Tex. Rev. Civ. Stat. Ann. (Vernon 1958):

> This court has repeatedly held suits filed to set aside fraudulent conveyances are regulated by the four-year statute of limitations, as provided for in Article 5529, Tex. Rev. Civ. Stat. Ann. (Vernon 1958). It has also held that the cause of action does not accrue or its limitation begin to run, until the fraud is discovered, or could have been discovered by the exercise of reasonable diligence. Article 5529 is the residual statute of limitation of actions for which there is no other statue of limitations, and by its application, the four-year statute excludes the application of the two and three-year statutes of limitations.

The detail and substance of these statutes is not material to these assignments of error concerning limitations.

b. Homestead Exemptions Pled by Respondent

The appellate court overruled Petitioner's assignment of error arguing that the trial court had erred when it overruled Petitioner's special exception to the effect that a homestead exemption is not

available as a defense for Respondent in an action to set aside a conveyance in fraud of creditors. Respondent cannot claim the exemption in her own right as a grantee of the deed conveyed to her because she acquired title to the property only after the property had become subject to the debts of the grantors. See 43 Tex. Jur. 3d, page 465: "For where a husband purchases property on which he attempts to establish his homestead with funds embezzled from his employer, the rights of the employer to impress the property with a constructive trust are superior to the rights to hold the property as homestead."

The homestead is an exemption only from forced sale at the instance of the creditors of the individual claiming the exemption, and Respondent, in so far as she makes a claim in her own right, is not indebted to Petitioner, and Petitioner is not one of her creditors. The case at bar being reviewed is similar to the embezzlement case above in that Petitioner is a creditor of the grantors of the property, and the right of the creditor to have a deed set aside as a conveyance in fraud of creditors is superior to the right of the grantee to hold the property as homestead.

The appellate court also overruled Petitioner's special exception to the effect that a homestead exemption defense is not available to Respondent in her unstated capacity as a member of the family unit

of the grantors who claimed the property as their homestead. Respondent failed to plead in her original answer that she was an unmarried adult child of the owner of the land who was using and possessing the land, or that she was entitled to an exemption under some other basis of the exemption laws, and thus Respondent's plea of homestead exemption was insufficient as a matter of law.

The pleadings of Respondent and her grantors in their original answer indicated that three named persons grouped together as defendants possessed a homestead. Respondent was the daughter of one of the grantors and the step-daughter of the other grantor. If, as Respondent and her grantors alleged, the grantors had a homestead exemption protecting their property from creditors, then Respondent, not being a minor child of either of the grantors, could only claim an exemption if she was an unmarried adult child living with the grantors in a family unit. Tex. Prob. Code Ann. Sec. 271 (Vernon 1980) defines what constitutes a "family" for purposes of homestead exemption law, and respondent could only claim she was part of a family if she alleges that she was an unmarried adult child at the time of the deaths of the grantors. Probate Statute: Appendix Section 4—Document U, page A-85.

c. Bona Fide Purchaser Pleadings by Respondent

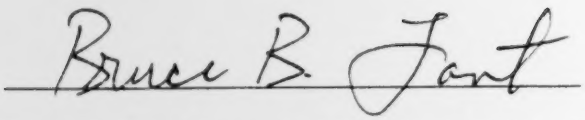
In her pleadings at the trial court level, Respondent set forth

only some of the allegations necessary to state a defense of bona fide purchaser. Petitioner specially excepted to Respondent's omission of a material allegation that her purchase of the property conveyed was made for a fair consideration. Such exception was overruled by the trial court, and the appellate court overruled Petitioner's assignment of error which argued that the trial court had erred in overruling this special exception. In an action to set aside a conveyance in fraud of creditor, one who seeks to claim a defense of bona fide purchaser is required to allege that the purchaser was made for a fair consideration. Fraudulent Conveyance Statute: Appendix Section 4—Document V, page A-86.

PRAYER

Premises considered, Petitioner prays that The Supreme Court of the United States of America grant this petition for writ of certiorari, and that upon hearing it, reverse all decisions rendered in the case at bar being reviewed subsequent to the judgment of the trial court, and remand the case at bar being reviewed to the appellate court for consideration of the subject of harmless error, with opportunity for Petitioner to be heard with respect thereto, by written or oral statement as the appellate court in its discretion chooses, and that costs be adjudged against Respondent.

Respectfully submitted,



Bruce B. Fant, Counsel of Record for Petitioner

Texas State Bar No. 06809220

J.W. Thomas, Associate Attorney

Texas State Bar No. 19881000

APPENDIX

APPENDIX SECTION 1—DOCUMENT A: ORDER DENYING APPLICATION FOR WRIT OF ERROR TO THE TEXAS SUPREME COURT

The Opinion Delivered By The Court Decision Is Sought To Be Reviewed:

The Supreme Court of Texas
Alfred E. Fant v. Johnnie B. Stephens
Case No. D-0244
Entered the fourteenth day of November, 1990

No opinion was delivered upon the rendering of the judgement by the Supreme Court of Texas denying discretionary review of the judgment of the appellate court in which the alleged constitutional error was merged and occurred. This denial of application was only orally announced and entered. In response to Petitioner's request to the Clerk of the Supreme Court of Texas for this judgment, the following announcement of the judgment was received:

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk
November 14, 1990

Mr. Bruce Fant
3902 Edgerock
Austin, TX 78731

Mr. J.W. Thomas
5746 Winston
Dallas, TX 75206

Mr. Robert H. Fields
Fields, Fields & Hardee
P.O. Box 1449
Athens, TX 75751

RE: Case No. D-0244
Style: ALFRED E. FANT
v. JOHNNIE B. STEPHENS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,
JOHN T. ADAMS, Clerk

by _____
Courtland Crocker, Deputy

APPENDIX SECTION 2—DOCUMENT A: OPINION OF THE APPELLATE COURT

Other Opinions Delivered:

The Court of Appeals for the Twelfth Court of Appeals District of Texas

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-88-00330-CV
Entered the thirty-first day of May, 1990

No. 12-88-00330-CV
Court of Appeals
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS

ALFRED E. FANT, APPELLANT	§	APPEAL FROM THE 3RD
V.	§	JUDICIAL DISTRICT
		COURT
JOHNNIE B. STEPHENS	§	OF HENDERSON
APPELLEE		COUNTY, TEXAS

Plaintiff/appellant Alfred E. Fant (hereinafter Fant) appeals from a take nothing judgment rendered on a jury verdict against him in his suit against defendant/appellee Johnnie B. Stephens (Stephens) to cancel an allegedly fraudulent transfer of two lots in rural Henderson County. The property comprises less than one-third of an acre, and was conveyed by deed to Stephens by her mother, Bessie Howell, and her step-father, Fred Howell. The suit was brought pursuant to

Tex. Bus. & Com. Code Ann. § 24.005(a)(1) (Vernon 1987) (hereinafter referred to as section 24.005). We will affirm the judgment.

Fant asserts seven points of error. By his first point, he complains of the trail court's action in excluding from the evidence the Texas Supreme Court Opinion in Fant v. Howell, 547 S.W.2d 261 (Tex. 1977).[1] Fant argues that Day v. Stone, 59 Tex. 612 (1883), stands for the proposition that in fraudulent transfer cases, "evidence of other like conveyances by the same parties, at, or about the same time, are admissible." While we agree that this proposition may be correct, the tendered evidence (plaintiff's exhibit no. 6) is totally irrelevant, and therefore inadmissible. Tex. R. Civ. Evid. 402. The trial court did not abuse its discretion in excluding the same. Fant's first point of error is overruled.

Fant alleges in his second point of error that the court erred in excluding his exhibit no. 13, which he terms an "appraisal"[2] of the lots that are the subject of the transfer from the Howells to Stephens, as contained in "the records and (tax) rolls of (the Tax Collector's) office..." The exhibit shows that each lot had an appraised value of $800.00 for the tax years 1977-1978. Fant argues that the certificate was relevant, and since it was self-authenticated, it was admissible under Tex. R. Civ. Evid. 902(1), 402, and 403. Stephens contends that the evidence was properly excluded since "(i)t is generally known that the values reflected by tax rolls do not reflect actual value(,)" citing 32 Tex. Jur. 3rd Eminent Domain § 270 (1984) and Houston Lighting & Power Co. v. Fisher, 559 S.W.2d 682, 686-687 (Tex. Civ. App. -Houston (14th Dist.) 1977, writ ref'd n.r.e.).

We conclude that the certificate was relevant and otherwise admissible, and that the court did abuse his discretion in excluding it from evidence. Recent legislation[3] has destroyed the rationale

adopted by Fisher and like cases. However, we conclude that the error was harmless under the test of Tex. R. App. P. 81(b)(1)* . The evidence reveals, as a matter of law, that at the time of the transfer the two lots in issue were a part of the rural homestead of the grantors, Fred and Bessie Howell. Hence, the lots were exempt from execution or liens other than those recognized in Tex. Const. art. XVI, § 50 (1845, amended 1973), and thus not subject to the provisions of section 24.005. Crow v. First National Bank of Whitney, 64 S.W.2d 377, 379 (Tex. Civ. App. -Waco 1933, writ ref'd), followed in Morris v. Morris, 482 S.W.2d 400, 402-403 (Tex. Civ. App. -Waco 1972, no writ).

Fant alleges in his points of errors nos. 3 through 7 that the trial court erred in overruling his five special exceptions to Stephens' original answer. By those pleadings, Fant excepted to Stephens' answer because (1) it failed to allege the requisite elements of the defense under the "bona fide (purchaser)" doctrine; (2) it alleged inapplicable statutes of limitations; (3) it failed to allege the "discovery" doctrine applicable in this case to the four-year statute of limitations; (4) it alleged the "homestead" defense as available to Stephens; and (5) it failed to allege that the "homestead" defense in this case was available to Stephens only as an unmarried adult child of the grantors.

Independent of Stephens' concession that "the judge[4] overruled all of the (special exceptions)," the record does not reflect that the written exceptions were called to the attention of the trial judge as required by Tex. R. Civ. P. 90, or that they were in fact overruled. However, in light of Stephens' admission that another judge earlier overruled Fant's special exceptions, we decide the points on their merits. In our opinion, points 3 through 7 are patently unmeritorious and we overrule them.

The judgment is affirmed.

PAUL S. COLLEY
Justice

Opinion delivered May 31, 1990.

(DO NOT PUBLISH)

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1 This case involved a contract of sale between the Howells as sellers and Fant as purchaser for lands located in Bell County. The Supreme Court reversed a take nothing judgment against Fant and remanded the cause to the District Court of Bell County, which rendered a money judgment for Fant against the Howells. That judgment was introduced into evidence at the trial of this cause as the debt upon which Fant based the present suit.

2 The exhibit is actually a certificate with a seal issued by the Tax Collector of the Frankston Independent School District, showing the appraised value of the two lots in question on the tax rolls.

3 See Tex. Tax Code Ann. § 23.01(a)(b) (Vernon 1982 and Vernon Supp. 1990).

* Text appended by Petitioner at end of opinion following page 4, Section 2, Document B, this Appendix.

4 This reference is to a judge other than the judge who presided over the trial on the merits.

APPENDIX SECTION 2—DOCUMENT B: APPELLATE PROCEDURAL RULE

Appellate Review Of Errors In The Trial Court:

Vernon's Annotated Texas Rules of Appellate Procedure, Rule 82(b)(1): (b)(1) Civil Cases: No judgement shall be reverse on appeal in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the right of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case…

APPENDIX SECTION 3—DOCUMENT A: ORDER ON MOTION FOR REHEARING TO THE APPELLATE COURT

Order Overruling Motion For Rehearing:

Court of Appeals for the Twelfth Court of Appeals District of Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 12-88-00330-CV
Entered the twentieth day of July, 1990

No opinion was delivered on the rendering of the decision and order of the appellate court overruling the motion for rehearing. In response to Petitioner's request to the clerk of the appellate court for the order overruling the motion for rehearing, the following announcement of the decision and order was received:

Court of Appeals
Twelfth Court of Appeals District

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

July 20, 1990
Notice

Hon. Bruce B. Fant
3902 Edgerock
Austin, TX 78731

Hon. Robert H. Fields
Fields, Fields & Hardee
P.O. Box 1449
308 South Palestine
Athens, TX 75751

RE: CASE NO. 12-88-00330-CV
TRIAL COURT CASE NO. 83-2

STYLE: Fant, Alfred E.
V: Howell, Fred, et al

You are hereby notified that in the above-described cause, the following decision and order was this day made and entered by this court:

"Appellant's Motion for Rehearing having been duly considered, it is ORDERED that said motion be, and hereby is, **overruled.**"

Respectfully yours,
BARBARA A. HOLMAN, Clerk

By _____
Chief Deputy

APPENDIX SECTION 3—DOCUMENT B: ORDER OVERRULING MOTION FOR REHEARING TO THE TEXAS SUPREME COURT

Order Overruling Motion For Rehearing:

The Supreme Court of Texas
Alfred E. Fant v. Johnnie B. Stephens
Case No. D-0244
Entered the twenty-third day of January, 1991

No opinion was delivered upon the rendering of the decision and order of the Supreme Court of Texas overruling the motion for rehearing. In response to Petitioner's request to the Clerk of the Supreme Court of Texas for the order overruling petitioner's motion for rehearing, the following announcement of the decision and order was received:

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk
January 23, 1991

Mr. Bruce Fant
3902 Edgerock
Austin, TX 78731

Mr. J.W. Thomas
5746 Winston
Dallas, TX 75206

Mr. Robert H. Fields
Fields, Fields & Hardee
P.O. Box 1449
Athens, TX 75751

RE: Case No. D-0244
Style: ALFRED E. FANT
v. JOHNNIE B. STEPHENS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,
JOHN T. ADAMS, Clerk

by _____
Courtland Crocker, Deputy

APPENDIX SECTION 4—DOCUMENT A: APPELLEE'S BRIEF

Appellee's Brief Filed With The Court Of Appeals:

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-80-00330-CV
Filed with the Clerk of the Court of Appeals, Twelfth Court of Appeals, District of Texas, on the sixteenth day of March, 1989

NO. 12-88-00330-CV
IN THE COURT OF APPEALS
FOR THE
TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT TYLER, TEXAS
ALFRED E. FANT,

Appellant

VS.

JOHNNIE B. STEPHENS,

Appellee

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF HENDERSON COUNTY, TEXAS

****

BRIEF OF APPELLEE

****

FIELDS, FIELDS & HARDEE
P.O. Box 1449
Athens, Texas 75751
(214) 675-5678
ATTORNEYS FOR APPELLEE

LIST OF NAMES OF THE PARTIES

The following is a complete list of all parties to this action:

APPELLANT:	ALFRED E. FANT Plaintiff at the Trial Court
APPELLEE:	JOHNNIE B. STEPHENS Defendant at the Trial Court

The following abbreviations are used in Appellee's Brief:

P.Exh.	-	Plaintiff's Exhibit
S.F.	-	Statement of Facts
Tr.	-	Transcript

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LIST OF AUTHORITIES

Housing Authority of Dallas vs. Brown
(1953, Dallas CA) 256 S.W. 2d 656

Houston Lighting and Power Company vs.
Fisher (1977, C.A. 14th Dist.) 559 S.W.
2d 682, Writ Ref. n.r.e.

Johnson v. Echols, 21 S.W. 2d 382 (Tex. Civ.
App. - Eastland 1929, Writ. ref.)

Texas Constitution, Art. XVI, Sec. 50

Texas Jur. III, Vol. 32, Sec. 270, Em.
Domain, Pg. 464

NO. 12-88-00330-CV

IN THE COURT OF APPEALS

FOR THE

TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT TYLER, TEXAS

ALFRED E. FANT,

Appellant

VS.

JOHNNIE B. STEPHENS,

Appellee

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

OF HENDERSON COUNTY, TEXAS

BRIEF OF APPELLEE

****

TO THE COURT OF APPEALS:

Appellee respectfully presents her brief in this cause.

STATEMENT OF THE CASE

Appellant sued Appellee to set aside a deed in default of creditor. The deed was dated June 14, 1978, from Fred Howell and wife, Bessie Inez Howell (original Defendants in this suit but dismissed by pleading before trial) as grantors to Johnnie B. Stephens (Appellee herein) as grantee conveying to her Lots 193 and 195 of Holiday Hills Subdivision in Henderson County, Texas. The case was tried to a jury which answered all issues in favor of Appellee upon which the trial court entered its judgment of take nothing against the Appellant, thus this appeal.

REPLIES TO POINTS OF ERROR

REPLY TO POINT OF ERROR NO. 1

THE TRIAL COURT DID NOT ERR IN EXCLUDING AS EVIDENCE THE OPINION OF THE SUPREME COURT OF TEXAS.

REPLY TO POINT OF ERROR NO. 2

THE TRIAL COURT DID NOT ERR IN EXCLUDING AS EVIDENCE OF MARKET VALUE OF THE LOTS IN QUESTION THE APPRAISAL OF THE TAX COLLECTOR OF FRANKSTON INDEPENDENT SCHOOL DISTRICT.

REPLY TO POINT OF ERROR NO. 3

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S SPECIAL EXCEPTION TO DEFENDANT'S ANSWER FOR ADMISSION OF ALLEGATION OF FAIR CONSIDERATION OF PURCHASE PRICE.

REPLY TO POINT OF ERROR NO. 4

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER PLEADING THE TWO AND THREE YEAR STATUTES OF LIMITATIONS.

REPLY TO POINT OF ERROR NO. 5

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER PLEADING THE FOUR YEAR STATUTE OF LIMITATION.

REPLY TO POINT OF ERROR NO. 6

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER ALLEGING HOMESTEAD OF DEFENDANTS.

REPLY TO POINT OF ERROR NO. 7

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER OMITTING ALLEGATION OF UNMARRIED ADULT CHILD FOR HOMESTEAD EXEMPTION.

STATEMENT OF FACTS

On May 22, 1978, in a suit styled Alfred E. Fant vs. Fred Howell, et ux, No. 43,855, in the 169th Judicial District Court of Bell County, Texas, Appellant recovered judgment against Fred Howell and wife, Bessie Howell (P.Exh. 1, S.F. 7-8). Writ of Execution was issued on this judgment on the 27th day of June, 1978 and returned nulla bona by the Sheriff's Department of Henderson County, Texas on August 31, 1978 (P.Exh. 2, S.F. 9). This judgment was filed in the Judgment Records of Henderson County, Texas on the 23rd day of August, 1978 in Vol. 9, Page 686 of the Abstract of Judgment Records (P.Exh. 2, S.F. 11-12).

On June 14, 1978 Bessie Inez Howell and husband, Louis Fred Howell, as grantors, by deed dated June 14, 1978 conveyed to Appellee Johnnie B. Stephens the lots involved in this suit; said deed was filed for record on June 15, 1978 and recorded in Vol. 841, Page 314 of the Deed Records of Henderson County, Texas (P.Exh. 9, S.F. 39-40). Fred Howell and wife, Bessie Inez Howell, conveyed Lot 194 of Holiday Hills to Appellee Johnnie B. Stephens by deed dated September 2, 1977 (P.Exh. 8, S.F. 38-39)

and filed for record with the County Clerk's Office of Henderson County, Texas on September 2, 1977 and recorded in Vol. 817, Page 31 of the Deed Records of Henderson County, Texas. Each of the Lots 193, 194 and 195 were 70 feet wide, (P.Exh. 5, S.F. 14). Fred Howell and wife, Bessie Howell, used and claimed the property as a homestead from October 1969 until it was conveyed to Appellee Johnnie B. Stephens.

Appellant filed his original petition in this matter on January 6, 1983 and named as Defendants Fred Howell and Bessie Howell and Appellee Johnnie B. Stephens (Tr. 3, S.F. 68). Defendants, Fred Howell and Bessie Howell and Johnnie B. Stephens filed their original answer on February 1, 1983 (Tr. 20). One of the original Defendants, Bessie Howell, was the mother of Appellee Johnnie B. Stephens, and died on December 27, 1983 at the age of 85. The original Defendant, Fred Howell, was the stepfather of Appellee Johnnie B. Stephens and he died on February 9, 1984 at the age of 91 (S.F. 56). After the deaths of Fred Howell and Bessie Howell, Appellant filed his First Amended Original Petition deleting them as party Defendants and did not substitute parties in their stead (Tr. 22).

This case was tried to a jury on special issues answered favorably to Appellee (Court's Charge Tr. 37). No objections were made to the Court's Charge nor the judgment on the quantum of proof.

REPLY TO POINT OF ERROR NO. 1

THE TRIAL COURT DID NOT ERR IN EXCLUDING AS EVIDENCE THE OPINION OF THE SUPREME COURT OF TEXAS.

The proposed opinion of the Supreme Court of Texas (P.Exh. 6, S.F. 15), had absolutely nothing to do with this case, did not involve Appellee and contained nothing factually for the jury's consideration. Appellee adopts as appropriate the statement of the trial court in excluding such evidence: "The Court: Mr. Thomas, the court admitted as Plaintiff's Exhibit 1 the judgment of the trial court in Bell County, which was offered and admitted without evidence. The opinion of the Supreme Court of Texas in the case is of course binding on this court, but the record of the case on what the appeal court holds is not admissible into evidence before the jury. The opinions of the highest court in the state are binding on the court.

You have the judgment of the trial court in evidence and the court holds that the record of the case on appeal is not admissible in evidence before the jury. I will take judicial notice of it, but I decide the law and the jury decides the facts." (S.F. 17-18)

REPLY TO POINT NO. 2

THE TRIAL COURT DID NOT ERR IN EXCLUDING AS EVIDENCE OF MARKET VALUE OF THE LOTS IN QUESTION THE APPRAISAL OF THE TAX COLLECTOR OF FRANKSTON INDEPENDENT SCHOOL DISTRICT.

In an attempt to prove market value, Appellant offered as evidence a purported copy of an appraisal for tax purposes by the tax collector of Frankston Independent School District (P.Exh. 13, S.F. 82). Appellee objected to the tax appraisal because of hearsay and lack of legal definition and the court excluded same (S.F. 82). The court was correct in excluding such evidence.

It is generally known that the values reflected by tax rolls do not

reflect actual value. See 32 Tex. Jur. III Sec. 270, Em. Dom. P. 464, and Housing Authority of Dallas V. Brown (1953, Dallas CA) 256 S.W. 2d 656.

In the case of Houston Lighting and Power Company vs. Fisher (1977, C.A. 14th Dist.) 559 S.W. 2d 682, Writ Ref. n.r.e., the Court held:

"Generally, value placed on real property for purposes of taxation by assessment without participation of land owner is not evidence of its value for purposes other than taxation. Such testimony is hearsay and represents opinion not subject to cross-examination. Exclusion of such testimony is also considered rule of practicality, since tax assessments rarely reflect true market value."

REPLY TO POINTS OF ERROR NOS. 3, 4, 5, 6, AND 7

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S SPECIAL EXCEPTION TO DEFENDANT'S ANSWER FOR ADMISSION OF ALLEGATION OF FAIR CONSIDERATION OF PURCHASE PRICE.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER PLEADING THE TWO AND THREE YEAR STATUTES OF LIMITATIONS.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER PLEADING THE FOUR YEAR STATUTES OF LIMITATION.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER ALLEGING HOMESTEAD OF DEFENDANTS.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S EXCEPTION TO APPELLEE'S ANSWER OMITTING ALLEGATION OF UNMARRIED ADULT CHILD FOR HOMESTEAD EXEMPTION.

Appellee replies to Points of Error Nos. 3, 4, 5, 6, and 7 as a group because they are based on the Trial Court's overruling Appellant's exceptions to Appellee's answer.

All of Appellant's exceptions to Appellee's answers were based on lack of or faulty allegations in Appellee's original answer. There is no written order or formal Bill of Exception evidencing the Trial Court's ruling on any exception. All of Appellant's theories of recovery, and upon which he had the burden of proof, were submitted to the jury and answered unfavorably to him.

The two, three and four year statutes of limitation defenses which Appellant complains of never came into play and had no bearing on the Trial Court's judgment. The Trial Court overruled Appellee's motion for an instructed verdict based on the statutes of limitation (S.F. 99), and no issues were submitted to the jury concerning same.

Fred Howell and wife, Bessie Howell, used and claimed the property as a homestead from October, 1969 until it was conveyed to Appellee Johnnie B. Stephens on June 14, 1978 (S.F. 25-26, 30-32, 47-48, 51, 69-80). A homestead owner has a right under both the Texas Constitution and statutes to sell homestead property free and clear of any judgment lien. Article XVI, Sec. 50, Texas

Constitution. Also see Johnson v. Echols, 21 S.W. 2d 382 (Tex. Civ. App. - Eastland 1929, Writ. ref.) wherein the Court stated: "It is equally well settled that, if Mrs. Echols owned a homestead interest in the lands, as alleged, she had, while such interest continued, the power and right to sell the same to her daughter or any other person, or to give it to them. Under the law, creditors have no interest in exempt property, and the debtor may sell it or give it away and pass title as against his creditors."

Appellant was not harmed because of any lack of pleading or proof on the part of Appellee but was only harmed by his failure to sustain his burden to prove his cause of action and obtain favorable findings from the jury on the issues submitting his case to them. There were no objections to the court's charge and no request for additional findings of fact or conclusions of law.

The Appellant failed to sustain his burden under the law and to plead, prove and obtain a favorable jury finding in this case.

CONCLUSION

Appellee respectfully requests that this court affirm the judgment of the Trial Court.

Respectfully submitted,

Robert H. Fields
FIELDS, FIELDS & HARDEE
P.O. Box 1449
Athens, Texas 75751
(214) 675-5678

BY: _____

ROBERT H. FIELDS
State Bar No. 06978000
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, ROBERT H. FIELDS, do hereby certify that on this the 16th day of March, 1989, I served a copy of the foregoing Brief of Appellee, the original of which is being filed with the Twelfth Court of Appeals, upon Bruce B. Fant, 3902 Edgerock, Austin, Texas 78731, and J.W. Thomas, 5746 Winston, Dallas, Texas 75206, attorneys for Appellant, by mailing the same to them by certified mail, return receipt requested.

_____

ROBERT H. FIELDS

RHF/ss

APPENDIX SECTION 4—DOCUMENT B: POINTS OF APPELLANT'S BRIEF

Appellant's Brief Filed With The Court Of Appeals:

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-88-0033-CV
Filed with the Clerk of the Court of Appeals, Twelfth Court of Appeals, District of Texas, on the twenty-second day of April, 1989

To the Honorable Court of Appeals for the Twelfth Court of Appeals District of Texas:

"X X X"

List of Points

POINT ONE: THE TRIAL COURT ERRED, IN EXCLUDING FROM EVIDENCE A RELEVANT JUDGMENT WHICH SHOWED LIABILITY OF APPELLEE WHICH THEREBY ESTABLISHED MOTIVATION IN A PRIOR CONVEYANCE IN FRAUD OF CREDITORS SIMILAR TO THE CONVEYANCE IN FRAUD OF CREDITORS AT ISSUE IN THE PRESENT CASE.

POINT TWO: THE TRIAL COURT ERRED IN EXCLUDING FROM EVIDENCE AN APPRAISAL OF VALUE IN A REPORT OF A PUBLIC OFFICER.

POINT THREE: THE TRIAL COURT ERRED IN OVERRULING A SPECIAL EXCEPTION TO THE EFFECT THAT APPELLEE'S DEFENSE OF BONA FIDE PURCHASER

WAS INSUFFICIENT AS A MATTER OF LAW BECAUSE SHE OMITTED THE MATERIAL ALLEGATION THAT THE PURCHASE WAS FOR A FAIR CONSIDERATION.

POINT FOUR: THE TRIAL COURT ERRED IN OVERRULING A SPECIAL EXCEPTION TO THE EFFECT THAT THE TWO AND THREE-YEAR STATUTES OF LIMITATIONS ALLEGED BY APPELLEE ARE INAPPLICABLE IN AN ACTION TO SET ASIDE A CONVEYANCE IN FRAUD OF CREDITORS.

POINT FIVE: THE TRIAL COURT ERRED IN OVERRULING A SPECIAL EXCEPTION TO THE EFFECT THAT THE FOUR-YEAR STATUTE OF LIMITATIONS ALLEGED BY APPELLEE IN AN ACTION TO SET ASIDE A CONVEYANCE IN FRAUD OF CREDITORS WAS INSUFFICIENT AS A MATTER OF LAW BECAUSE OF THE OMISSION OF THE MATERIAL ALLEGATION THAT APPELLANT HAD FAILED TO COMMENCE SUIT WITHIN A PERIOD OF FOUR YEARS AFTER APPELLANT HAD DISCOVERED, OR SHOULD HAVE DISCOVERED, THE EXISTENCE OF HIS CAUSE OF ACTION.

POINT SIX: THE TRIAL COURT ERRED IN OVERRULING A SPECIAL EXCEPTION TO THE EFFECT THAT APPELLEE'S PLEA OF HOMESTEAD EXEMPTION WAS UNAVAILABLE TO HER IN HER OWN RIGHT BECAUSE SHE HAD ACQUIRED TITLE ONLY AFTER THE LAND ACQUIRED HAD BEEN SUBJECT TO THE DEBTS OF THE GRANTORS.

POINT SEVEN: THE TRIAL COURT ERRED IN OVERRULING A SPECIAL EXCEPTION TO THE EFFECT

THAT APPELLEE'S PLEA OF HOMESTEAD EXEMPTION WAS UNAVAILABLE TO HER AS A MEMBER OF THE FAMILY PROTECTED BY THE EXEMPTION BECAUSE SHE OMITTED THE MATERIAL ALLEGATION THAT SHE WAS THE UNMARRIED ADULT CHILD IN THE FAMILY PROTECTED BY THE HOMESTEAD EXEMPTION, AND SHE FAILED TO ESTABLISH ANY OTHER GROUNDS UNDER THE HOMESTEAD EXEMPTION LAWS WHICH WOULD GIVE HER A HOMESTEAD EXEMPTION.

APPENDIX SECTION 4—DOCUMENT C: JUDGMENT OF THE TEXAS SUPREME COURT DATED FEBRUARY 9, 1977

Decision Of The Supreme Court Of The Texas Relevant To The Case At Bar Being Reviewed:

The Supreme Court of Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 11432
Entered the ninth day of February, 1977

IN THE SUPREME COURT OF TEXAS
NO. B-6142

ALFRED E. FANT, Petitioner, V. FRED HOWELL, et ux., Respondents.	FROM BELL COUNTY, THIRD DISTRICT.

This suit was brought by Alfred E. Fant against Fred and Bessie Howell for specific performance of a contract to convey property by general warranty deed and for compensation for a portion of the tract lost by adverse possession to third parties. The trial court rendered a directed verdict for the Howells and the court of civil appeals affirmed. 537 S.W.2d 350. We reverse and remand to the trial court.

On April 21, 1961 the Howells and Fant into a contract of sale for a tract of land[1] in Bell County. The agreed purchase price was

$30,000 and Fant made a down payment of $1,700. The $28,300 balance, with interest, was to be paid off in installments of $300 per month. Fant received "whatever physical possession the HOWELLS then had the property" upon the execution of the contract and, according to the terms thereof, was to receive a general warranty deed from the Howells at a later date.[2] At the time the contract was signed, third parties were in adverse possession of approximately 32.58 acres of property in issue and this fact was known to both the Howells and Fant. It was stipulated that the third parties acquired limitation title by adverse possession to the 32.58 acres some three years after the contract was signed.

Subsequent to the acquisition of limitation title by the third parties, Fant tendered, in September 1964, a check for $21,800, the amount then owing under the contract for the balance of the purchase price, and demanded a general warranty deed to the entire tract. The Howells refused to make such conveyance, asserting that because of Fant's inaction title to a portion of the land had vested in third parties through adverse possession under the ten year statute of limitations. Instead, the Howells offered to execute a warranty deed which limited the terms of their general warranty to the date of the contract; it recited that the "FANTS agreed that insofar as the warranty contained in such deed to them is concerned, HOWELLS expressly preserve, have and retain any defenses to an action against them on such warranty, if such defense arises from, or is based upon, any act or omission of FANTS, or action or inaction of FANTS, or either of them, which has occurred since April 21, 1961, and the warranty is limited to that extent." Fant would not agree to this limitation and instituted this suit which sought a general warranty deed covering the entire tract. By supplemental pleadings Fant now appears to be seeking partial specific performance in the

form of a general warranty deed to the portion of the tract not lost through adverse possession and, in addition, compensation for the portion lost through adverse possession.[3]

Upon the trial court's initial consideration of this case, it rendered a summary judgment that Fant take nothing. The judgment further provided that upon payment by Fant of the full purchase price the Howells were to execute and deliver a warranty deed containing the limitation proposed by the Howells.

On appeal the court of civil appeals reversed and remanded on the issue of whether title to a portion of the tract had indeed been lost through adverse possession.[4] 401 S.W.2d 294. The court of civil appeals wrote that if title had been lost through adverse possession after Fant went into possession then Fant could not recover against the Howells, and cited *Whitaker v. Felts*, 155 S.W.2d 604 (Tex. Comm. App. 1941, opinion adopted), and *Lesson v. City of Houston*, 243 S.W. 485 (Tex. Comm. App. 1922, jdmt adopted).

On remand Fant testified Howell promised to initiate a trespass to try title action against the third parties who were in possession of a portion of the tract and he offered as evidence of this promise a copy of a letter from Howell to Fant in which Howell agreed to file such an action if necessary. The trial court sustained Howell's objection to the introduction of the copy of the letter but overruled his objection to Fant's testimony. Fant also testified he made a demand upon Howell to file a trespass to try title action.

During this proceeding the parties also made the following stipulations of fact: (1) at the time of the contract of sale, April 21, 1961, the Howells and Fant knew that third parties were claiming a portion of the tract; (2) on the date of the contract Howell and his wife surrendered to Fant "whatever physical possession the HOWELLS then had of the property"; and (3) third parties had been

in adverse possession of a portion of the tract for approximately seven years prior to April 21, 1961 and title was lost to this portion through adverse possession about three years later. On the basis of these stipulated facts and the court of civil court of appeals' first opinion, the trial court rendered a directed verdict for the Howells on the grounds that Fant, as a purchaser who went into possession, should bear any loss resulting from this adverse possession and that this proposition was the "law of the case."

The court of civil appeals affirmed on the basis of *Leeson v. City of Houston, supra*, holding that "the purchaser under a contract of sale who goes into possession of the property acquires equitable title and by reason of the right receives any enhancement and must bear any detriment occurring without the fault of seller or purchaser." 537 S.W.2d 350 at 351.

An initial issue to be resolved is whether this court is bound by the first opinion of the court of civil appeals under the doctrine of the "law of the case." In *Burchfield v. Markham*, 156 Tex. 329, 294 S.W.2d 795 (1956), this court was faced with the following situation: The trial court rendered a summary judgment for Markham; the court of civil appeals reversed and remanded for a new trial; in its opinion the court of civil appeals gave its interpretation of a pertinent statute; this court refused an application for writ of error with the notation "no reversible error"; on remand the trial court rendered a judgment for Markham after a jury trail; and this judgment was affirmed by the court of civil appeals. Markham contended this court had to affirm because the appeal from the second decision of the court of civil appeals was governed by the "law of the case" as established in the first opinion by the court of civil appeals. This court stated:

"While the Court of Civil Appeals does state in its opinion that

> under its interpretation of the Real Estate Dealers License Act a contract to divide a commission between an attorney at law and a real estate dealer was lawful, it was not shown in the summary judgment proceeding just what the facts were in the case. As the Court of Civil Appeals stated, 'The facts and circumstances surrounding the transactions between the parties are disputed, and must be ascertained before their legal effect can be determined. The existence of any genuine issue of fact prevents the granting of summary judgment'. 267 S.W.2d 866, 867. *By refusing the application for writ of error with the notation of 'no reversible error' the Supreme Court approved only the result reached by the Court of Civil Appeals and not the statements as to the law in the opinion.*" 294 S.W.2d 795 at 798. (Emphasis added.)

The court concluded that "(u)nder the above facts it cannot be held that these statements of the Court of Civil Appeals (in its first opinion) setting forth its interpretation of the Act is the 'law of the case' binding on this Court," 294 S.W.2d 795 at 798, and then reversed and rendered judgment for Burchfield. Here, the initial summary judgment rendered by the trial court was reversed and the cause remanded by the court of civil appeals and this court dismissed the application for writ of error for want of jurisdiction. Under the reasoning of this court in *Burchfield v. Markham, supra*, the statements by the court of civil appeals in its first opinion that the instant case is governed by *Whitaker v. Felts, supra*, or by *Leeson v. City of Houston, supra*, is not the "law of the case."

Having concluded that the first opinion of the court of civil appeals did not establish the "law of the case," the next issue to be resolved is whether *Whitaker v. Felts, supra*, or *Lesson v. City of Houston, supra*, does indeed control the instant case.

In *Whitaker v. Felts, supra*, the cause of action was based on a *breach of a warranty deed*. The court reasoned that no breach of a warranty deed exists when the purchaser has yielded to a title which is inferior to that which he received from the seller. In the instant case Fant has not brought an action based on a breach of a warranty

deed; rather, Fant's suit is for a *breach of a contract to deliver a warranty deed* to *him*. Thus, the reasoning of *Whitaker v. Felts, supra*, does not apply to the present action.

The case of *Lesson v. City of Houston, supra*, stands for the proposition that a purchaser under a contract of sale who goes into possession of a tract of land receives the benefit of any enhancement in the land and must bear any detriment, depreciation, or loss which is not the fault of either party of the contract.[5] From the record and the stipulated facts in this case it is clear that Fant never went into possession of that portion of the tract[6] which was being claimed by adverse possession by the third parties. Therefore, this proposition of law is inapplicable.

The decision which does control the instant case is *English v. Jones*, 154 Tex. 132, 274 S.W.2d 666 (1955). English contracted to sell to Jones full title to a tract of land. At the time of the contract English only owned a 5/8th undivided interest in the property and Jones was aware of this fact. The remaining 3/8th undivided interest was owned by English's children and at the time of the contract of the sale the children were willing to join in a sale of the property. However, disagreements later arose due to English's insistence as to the manner of sharing the proceeds of the sale and English was unable to convey full title. This court applied the general rule "that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate." 274 S.W.2d 666 at 668. The court further held that under the circumstances of the case before it the fact Jones knew at the time of the contract that English did not have full title to the property did not bar his right to partial specific

performance. In the instant case Fant was aware of potential difficulty in the fulfillment by the Howells of their promise to convey the property by general warranty deed. However, there is nothing in the record before this court to excuse the failure of the Howells to initiate a trespass to try title suit against the third parties in adverse possession of a portion of the tract and thereby remain capable of fulfilling their promise to Fant to convey the entire tract by general warranty deed. Accordingly, under the facts of the instant case, Fant is entitled to receive (1) an abatement of the purchase price in the amount of the market value as of April 21, 1961 of the acres lost to third parties through adverse possession; (2) the return of interest payments attributable to the amount of the purchase price abated; and (3) partial specific performance in the form of a general warranty deed covering the remaining portion of the tract.

The judgments of the courts below are reversed and the cause is remanded to the trial court for the purpose of ascertaining the amount of the abatement of the purchase price and of the interest to be returned, for partial specific performance in the form of a general warranty deed covering that portion of the tract not lost through adverse possession, and for the determination of the acreage to be covered by this general warranty deed.

Sam D. Johnson

Justice

OPINION DELIVERED: February 9, 1977

[1] Following the metes and bounds description of the tract, the contract recites "...containing 227 acres of land, more or less. (Sometimes called 252 acre tract)." A subsequent survey apparently showed the tract to contain 259.58 acres.

2 A special condition of the contract of sale provided that whenever two existing liens on the property were fully paid the Howells would then convey the land to Fant by general warranty deed, and Fant would execute a note in the amount of the balance owed and would also execute a deed of trust. The pertinent language of condition number 9(b) is as follows:

"It is understood that the Federal Land Bank of Houston has a first lien on the property securing a note, the unpaid principal balance thereon being approximately $4,700.00, and that Eleanor Howell has an unrecorded lien securing the payment of $1,000.00 which Fred Howell has agreed to pay her at the time he conveys the above described property. Said $1,000.00 note does not bear interest. It is agreed that Seller will pay the annual installments on the Federal Land Bank lien as they mature. *The Seller shall convey the property* (by general warranty deed) *to the Purchaser and take the Purchaser's note*, secured by vendor's lien and deed of trust lien for the amount of the unpaid principal and interest which may still be owed at the time of such conveyance, *whenever the above mentioned lien indebtedness have been fully paid...*" (Emphasis added.)

3 Fant's first supplemental petition recites: "That if the defendants are unable to perform said contract as agreed and convey to the plaintiff a General Warranty Deed as agreed, then the plaintiff is entitled to be compensated for the land they did not receive and that was lost through limitation title because of the fault of the defendants and that the amount of the compensation due the plaintiff should be based on the market value of the land at the time the General Warranty Deed should have been delivered, said value being $450.00 per acre and further, that plaintiff be given his General Warranty Deed regarding the true balance of the remaining land being approximately 227 acres, more or less."

4 This court dismissed an application for writ of error for want of jurisdiction.

5 *Leeson v. City of Houston, supra*, at 488, recites: "By the great weight of authority it is now held that, although the legal title does not pass to the vendee under a contract of sale until actual delivery of a deed to the property still the vendee under such contract of purchaser, especially where he goes into possession of the property, is invested with the equitable title from the date of the contract, or in any event, from the date he takes possession, and any increment, advantage, or enhancement to the property inures to his benefit, and any detriment, depreciation, or loss thereto without fault of either party must be borne by him."

6 As stated by the court of civil appeals in its first opinion, 410 S.W.2d 294 at 295: "Appellant Fant went into possession of the property, except that portion adversely occupied..."

APPENDIX SECTION 4—DOCUMENT D: STATEMENT OF FACTS (PAGE 14-17) OF TRIAL OF CASE AT BAR BEING REVIEWED

Statement Of Facts In The Trial Court:

District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2
Statement of Facts of trial commenced on the tenth day of October, 1988

MR. THOMAS:

"X X X

Next, Your Honor, I'm going to ask the court to take judicial notice of the judgment of the Supreme Court of Texas, rendered or returned on the 9th day of February, 1977.

(Said document marked at this time as Plaintiff's Exhibit No. 6)

MR. FIELDS: Your Honor, this judgment of the Supreme Court of Texas he's offering here and marked as Exhibit No. 6 is completely irrelevant and immaterial in this thing. To start with, taking judicial notice doesn't take it out of hearsay as far as we're concerned.

All this can do is inject immaterial and irrelevant evidence into this case. It would confuse the jury. It would take a legal interpretation of this document. It has no purpose because the judgment that they're referring to, whatever court approves it, however it's approved, it's been admitted in the judgment and the writ of execution. It could not do anything to be material as far as

this jury is concerned considering something like this. We think it ought not burden up the record and have something for the jury that they won't understand. This is a matter the judge if he's called upon to interpret and rule upon as far as what the legal significance of it is. The factual situation is immaterial. This is something before the rendition of the judgment that they levied on. How they arrived at it and whether they approved it, the Supreme Court approved it and it's completely immaterial and we object to it. It has no place in this record.

THE COURT: Mr. Thomas, are you offering it in evidence?

MR. THOMAS: Yes. Asking you to take judicial notice of it. And then of course it will be evidence of the contents. The purpose of introducing this is to show a motivation of the deed of conveyance of September 2, 1977. This established the liability of Mr. and Mrs. Howell.

MR. FIELDS: Your Honor, additionally, we object to that to start with, this involved some parties that's not even party to this lawsuit. The Howells are not parties to this lawsuit. They chose to exclude them and they have been excluded by an amended pleading in this case. Anything pertaining to any other of those parties involving any situation like they're trying to project into this lawsuit is immaterial and it's hearsay to start with. The Supreme Court is not here for me to ask about. The Howells are not here for me to ask about anything. He's injecting stuff here by just standing up and saying things and we object to that.

No only do we object to that exhibit, we object to this statement that that exhibit purports to show some sort of motive on this conveyance. We object to that and ask the court to instruct the jury

not only that it does not have any bearing on any motive, the Supreme Court is not going to decide on something that's not even before them ten years before it happened. We ask the court to instruct the jury not to consider that for any purpose whatsoever.

THE COURT: Mr. Thomas, the court admitted as Plaintiff's Exhibit 1 the judgment of the trial court in Bell County, which was offered and admitted without evidence. The opinion of the Supreme Court of Texas in the case is of course binding on this court, but the record of the case on what the appeal court holds is not admissible into evidence before the jury. The opinions of the highest court in the state are binding on the court.

You have the judgment of the trial court in evidence and the court holds that the record of the case on appeal is not admissible in evidence before the jury. I will take judicial notice of it, but I decide the law and the jury decides the facts.

MR. FIELDS: If it please the court, Your Honor, would the court instruct the jury to disregard attorney Thomas' statement that any exhibits that's been excluded some improper motive on the part of the Howells who are not even a party to this lawsuit because it has no purpose in this?

THE COURT: Ladies and gentlemen of the jury, you are instructed not to consider any remark made by counsel regarding the effect of an exhibit which the court has not admitted in evidence. All right. You may continue.

APPENDIX SECTION 4—DOCUMENT E: WARRANTY DEED DATED SEPTEMBER 2, 1977

Deed Evidencing Conveyance Relevant To The Case At Bar Being Reviewed:

PLAINTIFF'S EXHIBIT 8

Warranty Deed
Fred Howell, et ux, grantors, to Johnnie B. Stephens
Dated the second day of September, 1977

The State of Texas	10092 VOL. 817 31
County of Henderson	Know All Men by These Presents:

That we, FRED HOWELL and wife, BESSIE INEZ HOWELL, of the County of Henderson, State of Texas for and in consideration of the sum of Ten and No/100 ($100.00) Dollars and other good and valuable consideration to us in hand paid by JOHNNIE B. STEPHENS as follows:

Ten Dollars cash in hand paid, the receipt of which is hereby acknowledged and confessed, have Granted, Sold and Conveyed, and by these presented do Grant, Sell and Convey, unto the said Johnnie B. Stephens, of the County of Henderson, State of Texas:

All that certain lot, tract or parcel of land situated in Henderson County, Texas, a part of the MARTIN PRUITT SURVEY, A-643, and being Lot No. One Hundred Ninety-Four (194) of Holiday Hill, a subdivision of 51.95 acres out of the Martin Pruitt Survey, according to the map or plat of said subdivision of record in Volume 2, Page 51, of the Map Records of Henderson County, Texas, to

which plat and the record thereof reference is here made for all purposes.

This conveyance is made by Grantors and accepted by Grantee subject to those certain restrictions set forth in a deed from H.I. Harris and Leroy Roquemore to T.J. Weldon, dated April 19, 1963, of record in Volume 534, Page 442, of the Deed Records of Henderson County, Texas.

VOL. 817, PAGE 32

TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Johnnie B. Stephens, her heirs and assigns forever and we do hereby bind ourselves, our heirs, executors and administrators, to Warrant and Forever Defend, all and singular the said premises unto the said Johnnie B. Stephens, her heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof.

WITNESS our hands at this 2nd day of September, 1977.

_____

Fred Howell

Witness at request of Grantor: _____

Bessie Inez Howell

SINGLE ACKNOWLEDGEMENT

THE STATE OF TEXAS,

COUNTY OF ANDERSON

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Fred Howell and wife, Bessie Inez Howell, known to me to be the persons whose

names are subscribed to the foregoing instrument acknowledged to me that they executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 2nd day of September, 1977.

(L.S.) _____

Notary Public in and for Anderson County, Texas

THE STATE OF TEXAS,
COUNTY OF

I HEREBY CERTIFY that the foregoing instrument of writing with its certificate of authentication, was filed for record in my office on the day of , A.D. 19 at o'clock M.

THE STATE OF TEXAS,
COUNTY OF HENDERSON

I, Joe Dan Fowler, Clerk of the County Court in and for Henderson County, Texas, do hereby certify that this instrument was FILED FOR RECORD and RECORDED in the volume and page of the named record and at the time and date stamped hereon by me.

County Clerk of Henderson County, Texas

APPENDIX SECTION 4—DOCUMENT F: STATEMENT OF FACTS (PAGE 39-40) OF TRIAL OF CASE AT BAR BEING REVIEWED

Statement Of Facts In The Trial Court:

District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2
Statement of Facts of trial commenced on the tenth day of October, 1988

MR. FIELDS: We have no objection to Plaintiff's Exhibit Nos. 8 and 9.

THE COURT: They'll be admitted.

MR. THOMAS: We'll note that both of these are self-proved documents, they're executed before a notary public. This is what I call the first deed. This is the deed of September 2, 1977. That's for Lot 194 where the home is. This is the one that's in controversy and I call your special attention to the fact that this deed is dated June 14, 1978, the same date of the deed by which Mr. and Mrs. Howell obeyed the judgment that they make the conveyance, and it's also before the same notary public of the deed in which they made the judgment.

APPENDIX SECTION 4—DOCUMENT G: THE WRITTEN APPRAISAL

Appraisal Of Property Relevant To Case At Bar Being Reviewed:

Tax Collector, Frankston Independent School District
Written the twenty-ninth day of February, 1988

Frankston Public Schools
P.O. Box 428
A/C 214 876-2556

February 29, 1988

To Whom It may Concern:

I, Ruth Tindel, Tax Collector for the Frankston Independent School District, Anderson County, Texas hereby certify that I have examined the records and rolls of my office and find the following:

Abstract 643, M. Pruitt Survey, Lot 194, Holiday Hills Subdivision was on the roll in the name of Fred Howell, Rt. 1, Box 146, Frankston, Tx.

1977	Appraised Value	Taxed at 60% of Value	
Lot	$800	$480	
House:	2,400	800	(Homestead)

Abstract 643, M. Pruitt Survey, Lots 193 & 195, Holiday Hills Subdivision was on the roll in the name of Mrs. Bessie Howell, Rt. 1, Box 146, Frankston, Tx.

1977	Appraised Value	Taxed at 60% of Value
Lot 193	$800	$480
Lot 195	800	480

Abstract 643, M. Pruitt Survey, Lot 194, Holiday Hills Subdivision was on the roll in the name of Fred Howell, Rt. 1, Box 146, Frankston, Tx.

1978	Appraised Value	Taxed at 60% of Value (Homestead)
Lot 194	$800	$480
House	2,400	1,440

Abstract 643, M. Pruitt Survey, Lots 193 & 195, Holiday Hills Subdivision was on the roll in the name of Mrs. Bessie Howell, Rt. 1, Box 146, Frankston, Tx.

1978	Appraised Value	Taxed at 60% of Value
Lot 193	$800	$480
Lot 195	800	480

seal February 29, 1988

Ruth Tindel, Tax Collector,
Frankston I.S.D.

APPENDIX SECTION 4—DOCUMENT H: STATEMENT OF FACTS (PAGE 82) OF TRIAL OF CASE AT BAR BEING REVIEWED

Statement of Facts in the Trial Court:

District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2
Statement of Facts of trial commenced on the tenth day of October, 1988

MR. THOMAS: This is a certified copy of appraisal of Lots 193 and 194 and 195, Frankston Independent School District for tax years 1977 and 1978.

MR. FIELDS: Your Honor, we object to those type of things. That's immaterial and that's something that has no bearing and it's hearsay as far as this lawsuit is concerned and there's no way to cross examine. There's no satisfaction of the legal definition of that, whether it's high or low or whatever it is. It's completely immaterial in this thing.

THE COURT: Sustained.

MR. FIELDS: The defendant requests the court to instruct the jury not to consider for any purpose whatsoever Mr. Thomas' statement concerning that that was an appraisal by anybody and we request the court to instruct the jury not to consider that.

MR. THOMAS: Your Honor, I understand the objection, but will the record that we did offer it and the objection was made and not entered as evidence?

THE COURT: Surely. Sustained.

APPENDIX SECTION 4—DOCUMENT L: PETITIONER'S MOTION FOR REHEARING TO THE APPELLATE COURT.

Petitioner's Motion For Rehearing:

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-88-00330-CV
Filed with the Clerk of the Court of Appeals, Twelfth Court of Appeals District of Texas, on the fourteenth day of June, 1990

Alfred E. Fant, Appellant, v. Johnnie B. Stephens, Appellee,
Number 12-88-00330-CV
In the Court of Appeals for the Twelfth Court of Appeals District of Texas

APPELLANT'S MOTION FOR REHEARING

To the Said Honorable Court:

Now comes Alfred E. Fant, desiring a rehearing of this cause with respect to judgment and decision of May 31, 1990, files this his motion for rehearing, declaring and relying on the following points:

POINT ONE: The court erred, in overruling Appellant's Point One which declared: "The trial court erred, in excluding from evidence, judgment relevant showing motivation for conveyance in fraud of creditors similar to such conveyance subject of suit on appeal."

POINT TWO: The court erred in overruling the Appellant's Point of Error Two which declared: "The trial court erred in excluding from evidence an appraisal of value in a report of a public officer", and

notwithstanding the error, and despite its adjudication as an error; the court erred in holding the trial court error harmless for each and all of the following particulars:

(a) outright

(b) in making an adjudication on grounds not presented by points and replies to points in the briefs

(c) in making an adjudication on grounds not presented by the points and replies to points and without prior furnishing of fair notice and opportunity to be heard to Appellant

(d) in holding the error of excluding relevant and otherwise admissible evidence harmless in the face of the admission of Appellee in the Brief of Appellee that Appellant was "... only harmed by his failure to sustain his burden to prove his cause of action." P.9, Brief of Appellee

(e) in proceeding without fair notice and without opportunity for Appellant to be heard beforehand thereby adversely affecting Appellant; and in departing from the subjects made material by the points and the replies to points; and in holding harmless the exclusion of evidence under conditions in which Appellee's brief, if it gave any hint of direction, pointed both the court and Appellant in the hazardous direction of treating the error as harmless by calling failure of proof harmful to the Appellant

(f) the omission of fair notice and opportunity to be heard by Appellant on the subject of a departure proposed by the court from adjudication on the issues of the points and replies to points was a procedural denial of property without due process of law forbidden with respect to a person by the Fourteenth Amendment to the constitution of the United States of America; the State having made appeal available in

adjudications affecting property, its courts are subject to such constitutional law regulating procedure

(g) the application of the homestead exemption subject set forth under the argument under Replies to Points (2) - (7) to Reply to Point Two. Texas Rules of Appellate Procedure, Rule 74(f) Argument "...pertinent..."

(h) in making a Tex R. App. R. Rule 81(b)(1) adjudication without taking into due account the merits of the pleading of the Appellant, in effect, abrogating, avoiding, or rendering, the homestead exemption of no avail:

(a) Paragraph 4, Plaintiff's First Amended Original Petition; and Paragraph 5, Plaintiff's First Supplemental Petition, and Second Supplemental Transcript P. 12, respective copies of which are attached as Exhibits "A" and "B"; and

(b) in making such an adjudication as that last above mentioned without taking into account such two parts of Appellant's pleadings with the further effect that Appellee has by omission to specially except to said two paragraphs of pleadings last above cited waived any insufficiency or arguendo error in such pleadings aside and apart from the merits. Rule 90, Texas Rules of civil Procedure. The uncontroverted evidence shows that the grantors retained possession until their deaths.

POINT THREE: The court erred in overruling the Appellant's Point of error Three which declared "The trial court erred in overruling special exception for omission of material allegation in bona fide purchaser defense that purchase was for a fair consideration."

POINT FOUR: The court erred in overruling the Appellant's Point of Error Four which declared "The trial court erred in overruling

special exception of inapplicability of two and three year statutes of limitations in action for setting aside a conveyance in fraud of creditors

POINT FIVE: The court erred in overruling the Appellant's Point of Error Five which declared that "The court erred in overruling special exception for omission of material allegation that action for setting aside a conveyance in fraud of creditors was not commenced within a period of four years after Appellant learned of the existence of such cause."

POINT SIX: The court erred in overruling the Appellant's Point of Error Six which read "The court erred in overruling special exception to pleas of homestead exemption as unavailing as defense for the grantee in a conveyance in fraud of creditors on the land thereby conveyed."

POINT SEVEN: The court erred in overruling the Appellant's Point of Error Seven which read "The court erred in overruling special exception of a plea of homestead exemption because of the omission of material allegation that appellee was an unmarried adult child of other parties, or other basis under exemption law."

Because of the lack of notice that the court would pass on a subject not raised in the points and replies to points, Appellant was surprised concerning new issues, and while prepared for motion for rehearing purposes, is not prepared for new issues and is excused from citations to parts of the record that he does not have a reasonable opportunity to obtain in the time available.

Premises considered, Appellant respectfully requests that rehearing be granted and that on such rehearing, the judgment of the trial court be reversed and remanded for a new trial.

Bruce Fant, Attorney for Appellant
3902 Edgerock Drive
Austin, Texas 78731
State Bar No. 06809220
Phone (512) 345-2819

In the alternative to the declaration in Paragraph 2 hereinabove set forth, it is alleged that the conveyance from Fred Howell and Bessie Howell should be adjudged and declared void and avoided because it was a transfer to delay, and alternatively, to hinder the Plaintiff as a creditor under such judgment from that as to which he might have been or have become entitled, namely, property vested in Fred Howell and Bessie Howell or either of them at the time of the death of the survivor of them or both of them if dying simultaneously out of which he could, or least had a reasonable expectation and reasonable probability, of satisfying such judgment by forced sale.

In this connection it is shown that Fred Howell and Bessie Howell continued in possession of the land conveyed to Defendant in such transfer, enjoying and using the same for a home, a badge of fraud until the time of her death December 27, 1983 in the case of Bessie Howell and until the time of his death, February 9, 1984 in the case of Fred Howell. Such continued possession subsequent to the purported conveyance subjects the property purportedly conveyed to avoidance as a transfer in fraud of creditor as the homestead exemption ceased upon he death of Fred Howell. At the time of such conveyance, neither Fred Howell and Bessie Howell alone or together owned property other than the property purportedly thus conveyed not exempt from forced sale sufficient to satisfy said judgment of this Plaintiff.

Plaintiff shows the court with respect to developing conditions since the filing of Defendants' Original Answer that the pleas of homestead exemption of Bessie Howell and Fred Howell, if urged further in this cause, should be barred, denied, or avoided because such exemptions, if any, ceased to exist when Bessie Howell died on December 27, 1983 with respect to her and when Fred Howell died on February 9, 1984 with respect to him and also with respect to Defendant Johnnie B. Stephens in so far as she endeavors to avail herself of them or either of them.

CERTIFICATE OF SERVICE

I, Bruce Fant, attorney of record for Appellant, state and certify that prior to mailing on this 14th day of June, 1990 the above and foregoing motion for hearing, I duly mailed with postage prepaid by certified mail to his address of record, a copy of the same to the attorney of record for the Appellee.

Bruce Fant, Attorney for Appellant
3902 Edgerock Drive
Austin, Texas 78731
State Bar No. 06809220
Phone (512) 345-2819

APPENDIX SECTION 4—DOCUMENT 1: REPORT FROM APPELLATE COURT OF FILING OF MOTION FOR REHEARING IN APPELLATE COURT

Report of Filing of Motion For Rehearing In The Court Of Appeals:

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-88-00330-CV
Written by the Clerk of the Court of Appeals, Twelfth Court of Appeals District of Texas, on the fourteenth day of June, 1990

Court of Appeals
Twelfth Court of Appeals District
1517 West Front Street
Suite 354
Tyler, Texas 75702
June 14, 1990

Hon. Bruce B. Fant
3902 Edgerock
Austin, TX 78731

Hon. Robert H. Fields
Fields, Fields & Hardee
P.O. Box 1449
308 South Palestine
Athens, TX 78751

RE: CASE NO. 12-88-00330-CV TRIAL COURT CASE NO. 83-2

STYLE: Fant, Alfred E.

V: Howell, Fred, et al

The Appellant's Motion for Rehearing in the above styled and numbered cause has this day been received and filed.

Respectfully yours,

Barbara A. Holman, Clerk

APPENDIX SECTION 4—DOCUMENT K: APPELLATE PROCEDURAL RULE

Filing Of Motion For Rehearing In The Court Of Appeals:

Vernon's Annotated Texas Rules of Appellate Procedure, Rule 100(a):

> (a) Motion for Rehearing: Any party desiring a rehearing of any matter determined by a court of appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified.

APPENDIX SECTION 4—DOCUMENT L: APPLICATION FOR WRIT OF ERROR FILED WITH THE APPELLATE COURT

Petitioner's Application For Writ Of Error:

Alfred E. Fant v. Johnnie B. Stephens
Case No. D-0244
Filed with the Clerk of the Court of Appeals, Twelfth District Court of Appeals of Texas, on the twentieth day of August, 1990

PETITIONER'S APPLICATION FOR WRIT OF ERROR TO THE HONORABLE SUPREME COURT OF TEXAS:

"XXX"

Second Point of Error

The court of appeals erred in making an adjudication of harmless error not requested by Respondent in her brief or presented by the points and replies to points without furnishing fair notice beforehand to Petitioner enabling him to be heard on the subject

Third Point of Error

The court of appeals erred in that the procedure made the basis of the Second Point of Error was denial of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States of America.

Fourth Point of Error

The court of appeals erred in making a condition of so-called harmless error of which claim or notice was not otherwise furnished in Respondent's brief justification for erroneous exclusion of evidence taking into account Respondent's admission in her brief

negating harmless error (Appellant, Petitioner here) was "...only harmed by his failure to sustain his burden to prove his cause of action." P. 9, (Appellee's Brief)

Statement

In the trial court, at the conclusion of the testimony, Respondent made a motion for instructed verdict, inter alia, on the defense of homestead exemption — "...no judgment or writ of execution or judgment lien can be attached to the homestead." 85, 83 S. F. This motion was overruled. 99, S. F. The overruling of the motion for instructed verdict on, inter alia, the homestead exemption, was exactly opposite to what the court of appeals declared on the subject of whether a homestead exemption existed as a matter of evidence from the pleadings and the evidence in the record. Respondent, Appellee in the court of appeals, did not complain of the ruling in this respect or any other in her brief.

The respondent in no way raised the issue of harmless error or gave notice to Petitioner that she was relying on the same with respect to the subject of the First Point of Error above or to another point in the court of civil appeals proceedings sustained to the effect that the trial court erred in excluding from evidence an appraisal of value evidenced in a report of a public officer but denied any effect thereof as it proceeded to find it harmless error. But she went beyond that standing on her objections, urging that the rulings of the court in excluding the two pieces of evidence was correct and right, stonewalling it so to speak, but even beyond that, she affirmed harm by arguing: Petitioner (there Appellant) was "...only harmed by his failure to sustain his burden to prove his cause of action," of which it might be here observed that Respondent contributed to this failure

by her two groundless objections inviting error in the trial court as was, it is submitted, the case. Thereupon the court of appeals, without furnishing Petitioner any notice that it proposed to do so, proceeded to adjudicate the subject of harmless error with obvious adverse impact on Petitioner.

Discussion

In the procedure of appeal, parties submit to a regimen of rigid rules boxing them in, in the walls of issues. Then, where is the fairness in permitting an appellate court to range far and wide from these issues and, without affording a party, any opportunity of input as in the case at bar, proceed to adjudicate the case on a subject not raised by the parties as issues? How can the Supreme Court or this Petitioner know whether the pleadings of the Petitioner affirmatively in its his amended petition or his supplemental petitions by defense were considered by the court of appeals? 12, Second Supplemental Transcript, 25, Tr.

That this unilateral excursion by the court of appeals from the issues as to which fair notice was given, without notice being a denial of property without due process of law prohibited by the Fourteenth Amendment to the Constitution of the United States of America is addressed by the court in WJR, The Goodwill Station v. Federal Communications Commission, 174 F. 2d 1226, 84 U. S. App. D. C. reversed on other grounds, 69 S Ct 1097, 337 U. S. 265, 93 L. Ed. 1353. The word "hearing" thus used can have two meanings. One denotes a hearing on the truth of the allegations made by a complainant. If that sense of the word, the generalization is correct; there is no division in this court on this. No person is entitled to a trial on the issue of the truth of the facts he alleges unless such facts legally constitute a "cause of action". But the word

"hearing" properly denotes also a hearing on the question of law as to the sufficiency of the allegations made by a complainant. In this sense of the word the generalization invalidly asserts that such a question can be decided without a hearing, e. e., without allowing the complainant an opportunity to argue to the tribunal to which his complaint is presented that the allegations of the complaint, assuming their truth, are as a matter of law sufficient. The assertion is invalid because the due process clause guarantee of hearing extends, as demonstrated above, to questions of law as well as to those of fact, and because the guarantee of hearing, as also demonstrated above is not conditional upon the ex parte view of the tribunal as to whether there is a substantial question as to the sufficiency of the allegations of a complainant." Akin in principle but not precisely in point: Union Cemetery Ass'n v. Kansas City, 161 S. W. 261, 252 Mo. 466 at p. 247 (161 S. W.)

APPENDIX SECTION 4—DOCUMENT M: REPORT FORM APPELLATE COURT OF FILING OF APPLICATION FOR WRIT OF ERROR

Report Of Filing Of Application For Writ Of Error

Alfred E. Fant v. Johnnie B. Stephens
Case No. 12-88-00330-CV
Written by the Clerk of the Court of Appeals, Twelfth Court of Appeals District of Texas, on the twentieth day of August, 1990

Court of Appeals
Twelfth Court of Appeals District
1517 West Front Street
Suite 354
Tyler, Texas 75702
August 20, 1990

Hon. Bruce B. Fant
3902 Edgerock
Austin, TX 78731

Hon. Robert H. Fields
Fields, Fields & Hardee
P. O. Box 1449
308 South Palestine
Athens, TX 75751

RE: CASE NO. 12-88-00330-CV TRIAL COURT CASE NO. 83-2

STYLE: Fant, Alfred E.

V: Howell, Fred, et al

The Appellant's Petition for Writ of Error in the above referenced cause has this day been received and filed.

Respectfully yours,
Barbara A. Holman, Clerk
by Katrina McClinny, Deputy

APPENDIX SECTION 4—DOCUMENT N: APPELLATE PROCEDURAL RULE

Filing Of Application For Writ Of Error In The Supreme Court Of Texas

Vernon's Annotated Texas Rules of Appellate Procedure, Rule 130:

Filing of Application:

(a) Method of Review. The Supreme Court may review final judgments of the courts of appeals upon writ of error.

(b) Time and Place of Filing. The application shall be filed with the Clerk of the Court of Appeals within thirty days after the overruling of the last timely motion for rehearing filed by any party.

APPENDIX SECTION 4—DOCUMENT O: PETITIONER'S MOTION FOR REHEARING TO THE TEXAS SUPREME COURT

Petitioner's Motion For Rehearing In The Supreme Court Of Texas:

Alfred E. Fant v. Johnnie B. Stephens

Case No. 12-88-00330-CV

Filed with the Clerk of the Supreme Court of Texas on the twenty-ninth day of November, 1990

Alfred E. Fant, Petitioner, v. Johnnie B. Stephens, Respondent,

Number D-0244

In the Supreme Court of Texas

Motion for Rehearing of Alfred E. Fant, Petitioner

Bruce B. Fant,
3902 Edgerock
Austin, Texas 78731
State Bar Card No. 06809220

J. W. Thomas, 5746 Winton,
Dallas, Texas 75206
State Bar Card No. 19881000

To the Honorable Supreme Court of Texas:

Alfred E. Fant, Petitioner, moves the court to set aside its decision and judgment denying the writ of error of Petitioner and the application therefor and to grant a rehearing and on rehearing to grant the writ of error for which application is made and to reverse the decision of the intermediate court and to reverse and remand the cause for new trial, and for grounds, shows the court as follows:

LIST OF AUTHORITIES

Fourteenth Amendment of the Constitution of the United States of America 4

1925 Texas Revised Civil Statutes

Article 3997 9

Article 5529 7

Texas Rules of Appellate Procedure

Rule 74(d) 4

Rule 74(e) 4

Vernon's Ann. Probate Code, Section 37 6

Cases

Day v. Stone, 59 Tex 612 3

Givens v. Hudson, 64 Tex 471 6,8

Hoerster v. Wilke, 138 Tex 263, 165 S. W. 288 7

The Goodwill Station v. Federal Communications Commission, 174 F. 2d 1226, 84 U.S.App. D.C., reversed on other grounds, 66 SCt 1097, 337 U.S. 265, 93 L Ed 1353 5

Wooten v. Westen, 121 S. E. 806 3

Treatises

Tex Jur 3rd p. 465 8

First Point:

The Supreme Court of Texas, "The Supreme Court," erred in denying application for writ of error thereby in effect not reversing a holding that judgment (Decision) showing motivation for conveyance subject of the suit, as well as near in point of time, was correctly excluded.

The decision of The Supreme Court in Fant v. Howell, 547 S. W.2d 261, was the preferable of the best two, if not the only two ways of evidencing the indebtedness or liability of the grantors in the deed of September, 1977, an alleged conveyance in fraud of the same creditor by the same debtors, as the conveyance in fraud of creditors by the deed of May 22, 1978, subject of the case in which the application for writ of error was filed, "the case at bar." Said decision was offered. S. F. 14, 15. S. F. 39, 40. S. F. 38, 39, 40. Plaintiff's Exhibits 3 and 9 Plaintiff's Exhibit 9. Plaintiff's Exhibit 1.

The other available mode of proof would have been the judgment itself of the Supreme Court. The later judgment in the trial court upon new trial after reversal and remand would not suffice for it was later in time than the earlier deed. Plaintiff's Exhibit 1.

There were three parties to the alleged scheme, two of whom were no longer living at the time of the trial of the case at bar. S. F. 48, 51, 81. Their evidence was not available. The alleged scheme was by its nature concealed as much as possible from Petitioner, its victim, and because conveyances in fraud of creditors tend to be clouded in secrecy, circumstantial evidence, especially that of similar conveyances in fraud of creditors has universally, including the jurisprudence of Texas, been deemed admissible in suits like the one at bar for setting aside a conveyance fraud of creditors because it is almost the only kind reasonably available to the victim, Petitioner in

this instance. Day v. Stone, 59 Tex 612, Wooten v. Wooten, 121 S. E. 806

The theory that "but for" the judgment of the Supreme Court of Texas excluded from evidence, S. F. 17, 18, the grantors would nevertheless have conveyed their home, almost the only property of substantial value to a daughter and step-daughter instead of devising it to her by will if indeed Respondent was the logical and natural object of their bounty would strain naïvete.

Second Point:

The Supreme Court erred in denying application for writ of error in effect not reversing an adjudication of harmless error not requested by Respondent in her brief or presented by the points and replies to points in her brief without furnishing fair notice beforehand to Petitioner enabling him to be heard on the subject.

A motion for instructed verdict, inter alia, on defense of homestead was made by Respondent. This motion was overruled. Respondent waived this issue of homestead exemption by not complaining of it in a point in her brief. Rule 74(d) and Rule 74(e), Texas Rules of Appellate Procedure. S. F. 83, 85, 89.

Third Point:

The Supreme Court erred in denying application for writ of error in effect not reversing the adjudication by the procedure made the basis of the Second Point which was a denial of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States of America.

The Respondent in no way raised the issue of harmless error or gave notice to Petitioner that she was relying on the same with respect to the subject of the First Point above or to another point in the court of civil appeals proceedings sustained to the effect that the trial court erred in excluding from evidence an appraisal of value

evidenced in a report of a public officer but denied any effect thereof as it proceeded to find it harmless error. Standing on her objections, she urged that the rulings of the trial court in excluding the two pieces of evidence was correct and right, stonewalling it, so to speak.

If the court of appeals chose to depart from issues, and importantly to raise issues of which Petitioner had no notice, it should have furnished notice beforehand and afforded Petitioner an opportunity to address the court of appeal's concern with that new issue. Omission to furnish notice of departure from issues and subjects of which notice had been given was simply unfair to Petitioner. This unfairness looms large and oppressive compared with the relative inconvenience of the court in a requirement that it furnish due notice of its intention to consider an issue not fairly raised by the briefs. This omission was a denial of procedural due process of law and a violation of the Fourteenth Amendment of the Constitution of the United States of America. Petitioner was harmed by lack of notice of judicial injection of new matter (until after decision of the court) because he was afforded no opportunity for input on the subject. Right of notice beforehand and an opportunity to be heard is constitutional right regarding the entire case, not just parts of it, or just most, but less than, all of it and this right to notice extends to the subject of law as well as fact. An appellate court's injection of new issues without notice to parties affected thereby amounts pro tanto or ratably to a departure from adversary litigation and becomes an inquisition. The Goodwill Station v. Federal Communications Commission. 174 F. 2d 1226, 84 U. S. App. D. C. reversed on other grounds, 69 SCt 1097, 337 U. S. 265, 93 l> Ed. 1353.

Fourth Point:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that an alleged homestead exemption of the property subject of the alleged conveyance in fraud of creditors in effect exempted conveyance from avoidance as a conveyance in fraud of creditors for such exemption was avoided by the continued possession of the grantors after the conveyance of the premises until their deaths.

After purporting to convey the land, which they claimed as homestead, the grantors continued to use it as their homestead through and including the times of their deaths. S. F. 38, 39, 40, 5, 6, 47, 48, 51, 81.

It is supported by well-established law that had Fred Howell and Bessie Howell owned the land purportedly conveyed by the conveyance alleged to be in fraud of creditors at the times of their deaths, it would have been subject to the payment of their debts. Givens v. Hudson, 64 Tex. 471. Vernon's Ann. Probate Code Section 37. Of the four main attributes of ownership title, possession, use, and enjoyment, all but the title were retained by the grantors in the alleged conveyance in fraud of creditors at the times of their respective deaths. Possession, use, and enjoyment which ordinarily between reasonable people change hands upon a conveyance did not change. With respect to the grantors and the grantee and the land subject of the action in the case at bar, none of these changed hands on either September 2, 1977 or June 14, 1978, the dates of the two deeds. All that either deed amounted to was a trip to the scrivener and back home for each.

Fifth Point:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that an allegation in action for setting aside a conveyance in fraud of creditors was not commenced

within a period of four years after Petitioner learned of the existence of the cause of action or should in the exercise of reasonable care have learned of the existence of the cause was not a material element or part of a defense of bar of limitations.

Sixth Point:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that two and three-year statutes of limitations are defenses applicable to an action for setting aside a conveyance in fraud of creditors.

Petitioner duly and timely leveled special exceptions to both of the alleged defects in the pleadings of the Respondent on the grounds set forth in the declarations of the two points last above listed and such special exceptions were overruled. Tr. 4, Par IV, Defendant's Original Answer. Tr. p. 30, Par. IV S. F. 88, 89.

The Supreme Court kills two birds with one stone in Hoerster v. Wilke, 138 Tex. 263, 156 S. W. 2888.

"This court has repeatedly held suits filed to set aside fraudulent conveyances are regulated by the four-year statute of limitations, as provided for in Article 5529. It has also held that the cause of action does not accrue or its limitation begin to run, until the fraud is discovered, or could have been discovered by the exercise of reasonable diligence."

Seventh Point:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that a homestead exemption avails as a defense for grantee in an action to set aside a conveyance in fraud of creditors.

Petitioner duly and timely leveled a special exception to the alleged defect in the pleading of the Respondent on the ground set

forth in the declaration of this last point. Such special exception was overruled. Tr. 20, S. F. 88, 89, 2d Suppl Tr 12.

With respect to a homestead exemption for Respondent herself as distinguished from being the unmarried adult child of her mother, one of the grantors in the alleged conveyance in fraud of creditors, she wholly omits to plead or otherwise show her own common law estate to which a homestead exemption could attach. Her right is derivative through the conveyance alleged to be in fraud of creditors and is subject to being set aside in her hands for homestead will not shore up a title or cut off equitable rights to set aside the conveyance to the homestead claimant. Homestead is no defense to an action for or under paramount title or an action alleging conveyance in fraud of creditors as being the transactions, the fruits of which are the very land upon which a person whose rights under the fraudulent conveyance are sought to be set aside.

On principle:

43 Tex. Jur. 3rd p. 465:

"x x x 'For where a husband purchases property on which he attempts to establish his homestead with funds embezzled from his employer, the rights of the employer to impress the property with a constructive trust are superior to the right to hold the property as homestead.'" Tr. 20, 35, S. F. 88, 89.

Point Eight:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that a party may avail herself of a homestead exemption in land while omitting an allegation in her pleading that she was an unmarried adult child of owner of the land using and possessing it or some other basis under exemption laws.

Petitioner duly and timely leveled a special exception to the alleged defect in the pleading of the Respondent on the ground set

forth in the declaration of this last point. Such special exception was overruled.

Exemptions of her step-father and her mother respectively ceased upon their deaths. What does Respondent have?

The Supreme Court: (Givens v. Hudson, 64 Tex 472:)

"The homestead may descend to and vest, as other real property of a deceased person in his heirs, and it may be governed by the same laws of descent and distribution as other real property and yet be liable to sale for the debts of the deceased person as other real property is liable, unless it has descended to or vested, wholly or in part in fee or lesser estate, in some person or association of persons, as in law constitute a family for it is only to the family that the exemption is given by constitution or statute." Respondent does not bring herself within the definition. Tr. 20, 35, S. F. 88, 89.

Point Nine:

The Supreme Court erred in denying application for writ of error in effect not reversing a holding that purchase was for fair consideration was not material to defense of bona fide purchase.

Petitioner duly and timely leveled a special exception to the alleged defect in the pleading of the Respondent on the ground set forth in the declaration of this last point. Such special exception was overruled. Tr. 20, S. F. 89.

Respondent claimed the defense of bona purchaser but omitted the material allegation to qualify herself as such that the purchase that she made was for a fair consideration as required by Article 3997, 1925 Texas Revised Civil Statutes, the accompanying exception to such requirement not being shown or applicable.

Point Ten:

The Supreme Court erred in denying application for writ of error in effect not reversing an adjudication making a condition of so-

called harmless error of which claim or notice was not otherwise furnished in Respondent's brief justification for erroneous exclusion of evidence taking into account Respondent's admission in her brief negating harmless error: (Appellant, Petitioner, here) was "...only harmed by his failure to sustain his burden to prove his cause of action."

Respondent herself by this admission in her brief iterates just the opposite of that held by the court of appeals that exclusion of evidence was harmless by saying, yes, saying, Petitioner was harmed, but whence came the harm? The exclusion of material evidence at behest of Respondent herself by the court of first instance contributed mightily to such so-called failure to sustain his "burden of proof." Respondent's (Appellee's) Brief, p. 9.

In consideration of the preceding assignments and points, Petitioner respectfully prays that this motion be granted, that denial of application for writ of error be set aside, and that the application for writ of error be granted and that the decision and judgment of the court of appeals be reversed and that the judgment of the trial court be reversed and that the cause be remanded for new trial.

Bruce B. Fant

J. W. Thomas, Attorneys for Petitioner

I, Bruce B. Fant, attorney of record for Petitioner state and certify that prior to the filing of the above and foregoing motion for

rehearing with the Clerk of the Supreme Court of Texas on this 29th day of November, 1990, I duly mailed on such date last above mentioned to the attorney of record of the only respondent in the cause in a wrapper duly addressed to his address of record with postage prepaid by certified mail a copy of such motion. The address of the attorney of record for the Respondent (with his name) is Mr. Robert H. Fields, Attorney at Law, 308 S. Palestine, P. O. Box 1449, Athens, Texas &5751.

Bruce B. Fant

APPENDIX SECTION 4—DOCUMENT P: APPELLATE PROCEDURAL RULE

Filing Of Motion For Rehearing In The Supreme Court Of Texas:

Vernon's Annotated Texas Rules of Appellate Procedure, Rule 190 (a): (a) Time for Filing. A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error.

APPENDIX SECTION 4—DOCUMENT O: APPELLATE PROCEDURAL RULE

Form For Appellant's And Appellee's Briefs In The Court Of Appeals:

Vernon's Annotated Texas Rules of Appellate Procedure, Rule 74

"XXX"

(d) A statement of the points upon which an appeal is predicated shall be stated in short form without argument and shall be separately numbered. In parenthesis after each point, reference shall be made to the page of the record where the matter complained of is to be found. A point is sufficient if it directs the attention of the appellate court to the error about which complaint is made.

(e) Brief of Appellee. The brief of the appellee shall reply to the points relied upon by the appellant in due order when practicable, and in civil cases, if the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief of the appellant.

(f) ...The argument shall include; (1) a fair, condensed statement of the facts pertinent to such points, with reference to the place in the record where the same may be found, and (2) such discussion of the facts and authorities relied upon as may be requisite to maintain the point at issue...

"XXX"

APPENDIX SECTION 4—DOCUMENT R: REPLICATION OF PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

Summary Of Plaintiff's (Petitioner Here) First Amended Original Petition In The Trial Court:

173rd District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION
TO THE HONORABLE JUDGE OF SAID COURT;

Now comes ALFRED E. FANT, hereinafter called Plaintiff, complaining of JOHNNIE B. STEPHENS, hereinafter called Defendant, and as grounds thereof, would show the court as follows:

It is alleged that the conveyance from Fred Howell and Bessie Howell to defendant should be adjudged and declared void because it was a transfer to delay, or alternatively to hinder the Plaintiff as a creditor who possessed a judgment against Fred and Bessie Howell. So long as the Howells lived upon the land and claimed it as a homestead exemption, such property was protected from creditors but upon the death of the Howells, such property could have been used to satisfy the judgment of Plaintiff.

In this connection, it is shown that Fred Howell and Bessie Howell continued in possession of the land conveyed to Defendant, enjoying and using the same as a home until the time of her death December 27, 1983 and until the time of his death, February 9,

1984. Such continued possession subjects the property to avoidance as a transfer in fraud of creditors, as the homestead exemption ceased upon the death of Fred Howell. At the time of such conveyance, neither Fred Howell nor Bessie Howell alone or together owned property other than the property thus conveyed, not exempt from forced sale sufficient to satisfy said judgment of this Plaintiff.

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APPENDIX SECTION 4—DOCUMENT S: PLAINTIFF'S THIRD SUPPLEMENTAL PETITION

Plaintiff's (Petitioner Here) Third Supplemental Petition In The Trial Court:

173rd District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2

Number 83-2

Alfred E. Fant, Plaintiff	In the 173rd Judicial
v.	District Court of
Fred Howell, et al, Defendants	Henderson County, Texas

Plaintiff's First Supplemental Petition

TO SAID HONORABLE COURT:

Now comes Alfred E. Fant, Plaintiff, in the above entitled and numbered cause, and files this his Third Supplemental Petition, and thereby makes reply to Defendants' Original Answer, showing the court as follows:

Plaintiff specially excepts to Paragraph V of such Original Answer as being insufficient in law in that it omits the material allegation that purchase was for a fair consideration, a requirement of the defense of bona fide purchaser in an action to set aside a conveyance in fraud of creditors.

Plaintiff specially excepts to Paragraph IV of such Original Answer as being insufficient in law in that the two and three-year

statutes of limitations are not applicable in an action to set aside a conveyance in fraud of creditors.

Plaintiff specially excepts to Paragraph IV and the plea of the four-year statute of limitations as being insufficient in law because it does not furnish notice as it fails to allege when Plaintiff's cause of action arose; and is further insufficient in law because it fails to allege, as is required by law in actions to set aside conveyances in fraud of creditors, that such action of Plaintiff was not commenced within a period of four years after Plaintiff learned of the existence of his cause of action, or that such action of Plaintiff was not commenced within a period of four years after Plaintiff should have learned, in the exercise of due diligence, of the existence of his cause of action, and therefore any defense based in whole or in part on the four-year statute of limitations should be held for naught for both or either of the reasons herein assigned.

Plaintiff specially excepts to the plea of homestead exemption as a defense with respect to Johnnie B. Stephens as included in the group "defendants," because it omits to allege any estate at common law under which she was entitled to claim a homestead exemption, it being shown that homestead exemption is no defense to an action alleging a fraudulent conveyance, the fruits of which are the land upon which a person whose rights under the fraudulent conveyance are sought to be set aside, seeks to establish a homestead and therefore any defense based in whole or in part by Defendant Johnnie B. Stephens on homestead should be held for naught.

Plaintiff shows the court with respect to developing conditions since the filing of Defendants' Original Answer, that the pleas of homestead exemption of Bessie Howell and Fred Howell, if urged further in this cause, should be barred, denied, or avoided, because such exemption, if any, ceased to exist when Bessie Howell died on

December 27, 1983 with respect to her, and when Fred Howell died on February 9, 1984, with respect to him, and also with respect to Defendant Johnnie B. Stephens, in so far as she endeavors to avail herself of the exemption.

With respect to any homestead that Defendant Johnnie B. Stephens declares as an exemption in light of conditions developing since the filing of Defendant' Original Answer and such deaths, as descendant of Bessie Howell, or otherwise, Plaintiff specially excepts to same as being insufficient in the absence of allegation that Bessie Howell was the unmarried adult child of whichever of Bessie Howell and Fred Howell she claims such exemption from debts of the decedent.

Plaintiff denies each, and every, all, and singular the allegations of Defendant's Original Answer that are not or cannot be construed or interpreted as admissions of allegations in Plaintiff's Original Petition.

Wherefore Plaintiff prays as in his Original Petition, and his First Amended Original Petition, asking judgment of the court with respect to each special exception and motion hereof, and such other and further relief to which he show himself entitled.

J. W. Thomas,
5746 Winton,
Dallas, Texas 75206
Attorney for Plaintiff
State Bar Card 19881000
Phone 214 361-1097

As attorney of record for Plaintiff, I state and certify that prior to mailing on this 27th day of April, 1988, the above and foregoing pleading to the District Clerk of Henderson County, Texas for filing, I mailed a copy of same to the attorney of record for the only other party to the cause at his address of record with postage prepaid in an envelope duly addressed to him by depositing same in a facility under the control of the United States Postal Department also on this twenty-seventh day of April, 1988.

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J. W. Thomas

APPENDIX SECTION 4—DOCUMENT T: REPLICATION OF STATEMENT OF FACTS (PAGE 83-85, 89) OF TRIAL OF CASE AT BAR BEING REVIEWED

Replication Of Statement Of Facts In The Trial Court:

173rd District Court of Henderson County, Texas
Alfred E. Fant v. Fred Howell, et al
Case No. 83-2
Statement of Facts of trial commenced on the tenth day of October, 1988.

MR. FIELDS: If it please the court, comes now the defendant Johnnie B. Stephens and after the plaintiff Alfred E. Fant has presented his evidence and announced to the court that the plaintiff rested his case and moves the court for an instructed verdict in favor of defendant Johnnie B. Stephens for the following reasons:

A.

First, the defendant has in her answers set up a complete legal defense of statute of limitations against this cause of action because same has not been filed as required by the limitation laws of the four year statute of limitations. The evidence shows that the judgment that the defendant has sued upon which he based his claim in this lawsuit against the defendant was signed and rendered on May 22, 1978 and that that judgment was filed in Henderson County, Texas on August 23, 1978 and writ of execution was issued and levied on that judgment and returned nulla bona on August 31, 1978. This lawsuit was not filed until January 6th of 1983, more than four

years from any of those dates, Your Honor, and we think that all of the evidence shows that the four year statute of limitation applies requiring them to bring suit within this four year period, which they failed to do and we think the defendant as a matter of law is entitled to a judgment in this case in her favor.

You want to rule on these one at a time, Your Honor?

THE COURT: Let me hear the rest of them.

B.

Your Honor, all of the evidence shows that the only two lots that's involved in this lawsuit is Lot 193 and Lot 195 in the Holiday Hills addition and that the other lot, 194, was deeded to the defendant Johnnie B. Stephens on September 2, 1977 and filed on September 2, 1977 in the deed records of Henderson County, Texas shown in Volume 817, Page 31.

That date of September 2, 1977 was prior to by several months any recovery of any judgment or any recording af any judgment or any levy of execution or whatever they might claim as part of their cause of action. Therefore, it's not involved in this lawsuit. That lot 194 is where the residence and the home is located and the records shows, all of the evidence shows that it's used in conjunction with and as part of the Lot 194. Now, defendant shows the court that there's something there that even if it was not deeded to the lady, which it was, but assuming all of these is used as part of the homestead as shown in the records here, no judgment or writ of execution of judgment lien can be attached to the homestead.

THE COURT: Gentlemen, the motion for instructed verdict is overruled. You may reurge the matters on post-judgment motions if you feel that the court has erred in ruling on the motion.

MR. THOMAS, have you rested?

MR. THOMAS: Yes, Your Honor.

THE COURT: Mr. Fields, anything further from the defendant?

MR. FIELDS: You Honor, I don't think so. Give me just a second here to get my thoughts a little bit better organized.

THE COURT: All right. If neither

APPENDIX SECTION 4—DOCUMENT U: PROBATE STATUTE

Relevant Texas Probate Statute Defining The Term "Family" For Purposes Of A Homestead Exemption Claim:

Tex. Prob. Code Ann. Sec. 271 (Vernon 1980)

Section 271. Exempt Property to be Set Apart

Immediately after the inventory, appraisement, and list of claims have been approved, the court shall, by order, set apart for the use and benefit of the surviving spouse and minor children and unmarried children remaining with the family of the deceased, all such property of the estate as is exempt from execution or forced sale by the constitution and laws of the state.

APPENDIX SECTION 4—DOCUMENT V: FRAUDULENT CONVEYANCE STATUTE

Relevant Texas Statute Showing The Necessity Of Pleading "Fair consideration" In Conveyance Which Is Contested As Being In Fraud Of Creditors:

> Tex. Rev. Civ. Stat. Ann. art. 3997 (Vernon 1966)
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> A transfer by a debtor is void with respect to an existing creditor of the debtor if the transfer is not made for a fair consideration unless in addition to the property transferred, the debtor has at the time of transfer enough property in this state subject to execution to pay all of his existing debts.
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> "xxx"

CERTIFICATE OF SERVICE

I, Bruce B. Fant, do hereby certify that there is only one adverse party in this action who is required to be served, and his name is Robert H. Fields, attorney for Johnnie B. Stephens who is the Respondent in this action. I do also hereby certify that I served said Robert H. Fields by depositing three copies of the foregoing Petition for Writ of Certiorari into a United States post office, on the 20th day of April, 1991, with postage prepaid thereon, return receipt requested, and duly addressed to Robert H. Fields, 308 S. Palestine, P.O. Box 1449, Athens, Texas, phone number (214) 675-5678. I further certify that I mailed the above-mentioned documents to Robert H. Fields before I filed the original Petition for Writ of Certiorari with the Clerk of the United States Supreme Court.

Bruce B. Fant

Bruce B. Fant, Counsel of Record
for Petitioner
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